(3)

No. 87-157-CFX
Status: GRANTED

Title: Allied Tube & Conduit Corporation, Petitioner
v.
Indian Head, Inc.

Docketed:
July 23, 1987

Court: United States Court of Appeals
for the Second Circuit

See also:
87-687

Counsel for petitioner: Frankel,Marvin E.

Counsel for respondent: Yerman,Fredric

Entry	Date	Note	Proceedings and Orders
1	Jul 23 1987	G	Petition for writ of certiorari filed.
2	Aug 21 1987		Brief of respondent Indian Head, Inc. in opposition filed.
4	Aug 24 1987	X	Brief amicus curiae of Illinois filed.
3	Aug 26 1987		DISTRIBUTED. September 28, 1987
5	Sep 17 1987	X	Supplemental brief of petitioner Allied Tube & Conduit Corp. filed.
6	Oct 5 1987		Petition GRANTED.
			**********
7	Nov 19 1987		Joint appendix filed.
8	Nov 19 1987		Brief amicus curiae of Illinois filed.
9	Nov 19 1987		Brief amici curiae of Western Fire Chiefs Assn., et al. filed.
10	Nov 19 1987		Brief of petitioner Allied Tube & Conduit Corp. filed.
18	Dec 3 1987	D	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
12	Dec 4 1987		Order extending time to file brief of respondent on the merits until January 2, 1988.
13	Dec 31 1987		Brief of respondent Indian Head, Inc. filed.
15	Dec 31 1987		Brief amici curiae of Twenty-Five States filed.
16	Dec 31 1987		Brief amicus curiae of United States filed.
14	Jan 5 1988		CIRCULATED.
17	Jan 5 1988		SET FOR ARGUMENT. Wednesday, February 24, 1988. (2nd case). (1 hour).
19	Jan 19 1988		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
20	Jan 29 1988	X	Reply brief of petitioner Allied Tube & Conduit Corp. filed.
21	Feb 24 1988		ARGUED.

Supreme Court, U.S.
FILED
JUL 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALLIED TUBE & CONDUIT CORPORATION,

Petitioner,

—vs.—

INDIAN HEAD, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

In an effort to influence state and local legislative enactment of the National Electrical Code ("NEC"), a model code prepared by the National Fire Protection Association ("NFPA") which is widely disseminated and adopted in legislative codes, petitioner "packed" an NFPA meeting seeking to prevent inclusion of respondent's product in the NEC on the ground of its toxicity and dangerousness. The action violated no rule of the NFPA. There was scientific evidence, believed by petitioner, that respondent's product was unsafe. Petitioner also acted on the recognition, however, that its success at the NFPA would, if followed by legislative enactment of the NEC, restrain the competition of that product. The questions presented are:

1. Whether petitioner's action in the NFPA meeting could be held an actionable restraint of trade leading to treble damages under the Sherman Act consistently with *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and succeeding decisions of this Court further defining the doctrine of that case.

2. Whether, even without regard to the *Noerr* doctrine, such lobbying and voting tactics, otherwise lawful and in compliance with the rules of a code-making association, are proscribed by the Sherman Act if a jury finds they "subvert" the rules.

RULE 28.1 STATEMENT

Allied Tube & Conduit Corporation is a wholly owned subsidiary of Atcor, Inc.

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IN THE

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OCTOBER TERM, 1987

No. _____

ALLIED TUBE & CONDUIT CORPORATION,

Petitioner,

—vs.—

INDIAN HEAD, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Allied Tube & Conduit Corporation ("Allied"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on April 22, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, 1a-22a) is not yet reported. The oral opinion of the District Court (App. B, *infra*, 23a-32a) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 22, 1987. A timely petition for rehearing was denied on June 11, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal.

STATEMENT OF THE CASE

1. The Facts

The facts giving rise to this case are well stated in the opinion of the Court of Appeals. (App. 3a-8a.) That account is quoted here for convenience:[1]

"The evidence presented to the district court established the following. [Respondent] Carlon, a division of Indian Head, Inc., manufactures and sells flexible plastic electrical conduit made from polyvinyl chloride (PVC). Electrical conduit is hollow tubing used in building construction to carry insulated electrical wires through floors, walls, and ceilings, and outside buildings, and to protect the wires from damage or abuse.

---

1 Petitioner and respondent have been referred to, respectively, as Allied and Carlon throughout, and those designations are followed in this petition.

Carlon's product competes in the marketplace against steel conduit, of which Allied is the largest producer in the United States. Carlon claims that PVC conduit [also known as electrical non-metallic tubing or ENMT] has a number of significant competitive advantages over steel conduit, including its pliability, its lower installed cost, and its lower susceptibility to short circuiting. On the other hand, as the district court instructed the jury, 'there is a scientific basis for a concern about safety of PVC products with respect to toxicity. . . . [T]he parties do not dispute that people disagree on the issue and there is an objective basis for a concern for safety.' Allied particularly stresses the fact that, during fires in high-rise structures, PVC conduit may burn, emitting toxic smoke and fumes.

"This case arises from Allied's efforts to block Carlon's proposal to include PVC conduit as a permissible type of electrical conduit in the 1981 edition of the National Electrical Code (NEC)—a model code, promulgated by the National Fire Protection Association (NFPA), which establishes product and performance requirements for electrical systems, including electrical conduit. The parties agree that NEC is the most widely disseminated and adopted model code in the world. The parties agree further that a substantial number of state and local governments adopt the NEC as law in whole or in part.

"Every three years, the NFPA—a private, voluntary organization composed of over 31,500 individual and group members representing industry, labor, academia, insurance, organized medicine, firefighters, and government—revises the NEC through a multi-step, several-year-long process. The NFPA first submits proposed amendments to the NEC to a Code-Making Panel (CMP) made up of professionals with technical expertise in the area. In order to prevent domination by special interests, no more than one-third of any CMP's membership may represent a single interest. If approved by the CMP, a proposal then goes to the full membership, together with the comments and voting position of each CMP member. After the membership has had an opportunity to comment on the proposal, the CMP considers it a second time, along with the membership's comments. If again approved, the NFPA pub-

lishes the proposed amendment to the full membership. The entire membership then votes.

"In 1980, when Carlon's proposal was being considered, a simple majority of those present at the annual meeting was sufficient to approve or reject a proposal. Disappointed members can appeal the membership's vote to NFPA's Standards Council and ultimately to its Board of Directors. Finally, NFPA rules also permit *de novo* review of a defeated proposal by the CMP, the Standards Council, and the Board of Directors, in a procedure known as a Tentative Interim Amendment (TIA). If adopted, a TIA includes or excludes a proposal on an interim basis until the next code cycle.

"On September 18, 1978, Carlon began the process of obtaining NEC approval for PVC conduit by submitting its proposal, known as Article 331, to the NFPA, along with a fact-finding report by the Underwriters Laboratories. The NFPA directed the proposal to CMP-8, which initially rejected it. However, in December, 1979, based on further fact-finding and field demonstrations by Carlon, CMP-8 reversed its earlier decision and approved Article 331 for review by the full membership. The NFPA then scheduled the article for consideration by the full membership at the next annual meeting, to be held in Boston in May, 1980.

"Recognizing that inclusion of PVC conduit in the NEC might adversely affect its sales of steel conduit, Allied's representatives met with a number of different groups, including other members of the steel industry, to gather votes in opposition to Article 331. On January 30, 1980, the Steel Rigid Conduit and Electrical Section of the National Electrical Manufacturers Association (NEMA) held a meeting to discuss the matter. At that meeting, and at a full meeting of the NEMA Steel Section held in February, everyone agreed to bring as many voters as possible to the upcoming NFPA meeting; Allied itself pledged to bring at least 100 people to vote against Article 331. Additional meetings and communications were held among the steel interests to coordinate their efforts to block Article 331's adoption. Acting within the letter of NFPA

rules, Allied eventually arranged for 155 persons—including employees, sales agents, the agents' employees, company executives, employees of two of Allied's divisions, and the wife of the national sales director—to join the NFPA, to register as voting members, and to attend the annual meeting to vote against the proposal. Allied also paid over $100,000 for the membership, registration, and attendance expenses of these voters. The other steel interests similarly recruited and paid for the expenses of voters at the May, 1980 meeting. In total, the steel interests gathered 230 votes.

"Carlon made no attempt to sign up additional employees or sales agents other than the four already scheduled to attend the meeting. Until about April 18, 1980, H.F. van der Voort, who coordinated Carlon's efforts to amend the NEC, apparently believed that the NFPA's rules did not permit a motion from the floor to return Article 331 to CMP-8. On or about April 18, van der Voort discovered that such a motion could, in fact, be made. By this time, Carlon could not have signed up additional members to vote at the May meeting; under NFPA rules, only those who have been NFPA members for at least 30 days could vote at an annual meeting. However, Carlon did solicit support from members of the Society of Plastics Industry, the NEMA plastics section, other members of the plastics industry, NFPA's railroad and health care sections, and the Fire Marshals Association of North America.

"At the annual meeting, Allied instructed its personnel where to sit, based upon a detailed seating chart, and appointed group leaders to instruct the voters 'how the discussion is progressing and how to vote.' Boxed lunches were provided and the voters were told to 'stay nailed to their seats' until the end of two evening sessions. Group leaders used walkie-talkies and hand signals to facilitate communication. Few of Allied's voters had any of the technical documentation necessary to follow the meeting; nor did any of them speak in opposition to Article 331 in the course of the meeting.

"Two votes were taken on the motion to return Article 331 to CMP-8. The first, a voice vote, was inconclusive. The second, a standing vote, approved the motion by a vote of 394-390. To insure its victory, Allied insisted that its representatives remain in their seats until 2:00 a.m., when the NFPA membership voted to approve the entire NEC, without Article 331. [The voting session began after 1:00 p.m. and lasted over 12 hours, with the debate on Article 331 consuming about thirty minutes. (A. 605-06, 1760-80, 3456.)[2]] Carlon immediately appealed the decision of the membership to the Standards Council, which referred the appeal to the Board of Directors. Finding that the NFPA rules had been circumvented but not violated, the Board denied the appeal, and returned Article 331 to the CMP-8. In June, 1980, Carlon applied for a TIA including Article 331 in the 1981 NEC. After the proposed TIA wound its way through the various levels of the code-making process, encountering opposition by Allied at each step, a subcommittee of the Board of Directors found that Carlon's request was not sufficiently exigent to warrant issuance of the TIA."[3]

Although not mentioned in the Court of Appeals opinion, it is relevant that, in January, 1983, the newly established NFPA Advisory Committee on the Toxicity of the Products of Combustion ("TAC"), created in response to the issues raised by the NFPA's handling of Article 331, reviewed all proposals for the 1984 NEC with regard to toxicity, including Article 331, which had been resubmitted by Carlon. (A. 3312, 3338-43.) In February, 1983, the TAC recommended, "based upon its best judgment of the known hazards involved," that the uses of ENMT be restricted to structures less than three stories in height. (A. 3024-26.) Article 331 was amended in accordance with TAC's recommendation and added to the 1984 NEC.

2 This and similar references are to the Joint Appendix in the Court of Appeals.

3 The NFPA Board of Directors was greatly concerned about the toxicity issue and "simply did not want to run the risk of compounding the [safety] problem when, in fact, [they] needed considerably more data than was available at the time." (A. 2843-44.)

2. The Claims and Defenses

Carlon began this action against Allied and the NFPA[4] on October 9, 1981, alleging that they, the American Iron and Steel Institute, other steel conduit manufacturers and Allied's independent sales agents had "combined and conspired to prevent competition from non-metallic tubing by excluding it from the 1981 NEC." (Complaint para. 17, A. 19.) The complaint stated that "[a]s promulgated by defendant NFPA, a private corporation, the NEC is advisory and does not carry the force of law." (*Id.* para. 13, A. 17.) But exclusion from the NEC was nevertheless alleged to cause injury because the NEC is routinely and "widely adopted" as law, "in whole or in substantial part," in statewide and municipal codes. (*Id.*)

Carlon's injury was alleged to flow directly from that legislative action in adopting the NEC:

> Because of the adoption and application of the NEC by states and municipalities as described in paragraph 13 above, the combination and conspiracy had and continues to have the following unlawful effects, among others:
>
> (a) Carlon has been almost wholly excluded from selling non-metallic tubing in competition with steel tubing manufactured by defendant Allied and others of the co-conspirators.

(*Id.* para. 30, A. 24.)

Carlon tried the case to the jury on that theory—that legislative adoption of the NEC was the cause of its injury.

Allied defended on a number of grounds. It did not dispute that it had engaged in an all-out effort to oppose Carlon's PVC product within the NFPA because the NEC is virtually the exclusive basis for governmental regulation of electrical installations within the United States. Instead, its answer asserted that its actions concerning the 1981 NEC "constituted valid lobbying activity" protected under the doctrine of *East-*

4 In August, 1982, Carlon discontinued its action against the NFPA. Terms of the settlement were not disclosed.

ern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965). (Answer para. 26, A. 31.) Allied also asserted that its activities were protected under the First and Fourteenth Amendments to the Constitution, were based on a good-faith, well founded belief that PVC products in fact constitute a danger to the public, were intended to make certain the NFPA considered toxicity in connection with Article 331 and other code provisions, and were in conformance with the NFPA's by-laws, standards and procedures. (*Id.* paras. 20-28, A. 30-31.) Among other affirmative defenses, Allied asserted that its actions and the alleged conspiracy had not proximately caused any injury to Carlon. (*Id.* paras. 35, 37, A. 33.) Any harm to Carlon would have resulted from the actions of state and local legislative bodies in enacting the NEC. (*Id.*)

3. The Verdict

At the end of a five-week trial on liability, the jury was asked to respond to 11 questions.[5] Its specific findings of fact, as distinguished from its conclusions, were as follows:

> Allied had a genuine belief as of May, 1980 that electrical nonmetallic tubing was unsafe. (A. 474A.)
>
> Allied acted at least in part on its belief that ENMT was unsafe in opposing Article 331. (A. 474D.)
>
> Allied's conduct did not violate any of the rules or regulations of the NFPA. (A. 474F.)
>
> The NFPA membership vote did not effectively determine whether Article 331 would be excluded from the Code. (A. 474H.)
>
> The NFPA rules and regulations were fair in that they provided a full and effective appeal from the vote of the membership. (A. 474I.)

5 A twelfth question "Was Allied genuinely attempting to influence the NFPA in opposing Article 331?" (A. 474E) was taken from the jury after Carlon conceded that there was no issue as to whether Allied genuinely attempted to influence the NFPA.

> Allied's conduct did not deprive Carlon of full and effective access to the NFPA. (A. 474J.)

In addition, the parties had agreed that the "exclusion of PVC conduit from the 1981 NEC was supported by objective scientific evidence." (App. 22a.)

The jury's other findings were that Allied's conduct was "a substantial or material factor in excluding Article 331 from the 1981 NEC" (A. 474K), "subvert[ed] the consensus standard making process of the NFPA" (A. 474G), did not "constitute the least restrictive means of effectively expressing Allied's opposition to the use of ENMT in the marketplace" (A. 474L), "adversely impact[ed] competition" (A. 474M), and "constitute[d] an unreasonable restraint of trade in violation of the antitrust laws" (A. 474N).

After further hearings on the issue of damages, the jury awarded Carlon $3.8 million, to be trebled, plus attorneys' fees. (A. 474O.)

4. The Judgment Notwithstanding the Verdict

Allied moved to set aside the verdict primarily on the ground that its conduct in connection with the 1981 NEC was protected from antitrust liability under the *Noerr-Pennington* doctrine.

The District Court granted the motion, holding that the *Noerr-Pennington* doctrine applies to conduct outside the legislative halls and is not limited to direct acts of petitioning the government. The court observed that Allied's activity within the NFPA was closer to the legislative process than the public relations campaign protected in *Noerr*. The code adopted by the NFPA, the court noted, "will almost inescapably be followed by the legislatures of the various states. . . . [T]he decision of the NFPA will be largely determinative of what the legislatures do." (App. 25a-26a.)

The District Court rejected Carlon's argument that Allied's conduct was so "reprehensible" and "outrageous" as to lose *Noerr-Pennington* protection. That activity was held to be "so

much a part of the traditional democratic process at every level of our society, from the local club right through the Congress itself," that it could not be deemed to be "so outrageous in and of itself so as to be unprotected." (App. 26a-27a.) Carlon had the "same opportunity to advocate its position before the NFPA" and "clearly [was] not excluded from that process in any way." (App. 30a.)

Finally, the District Court found that Carlon's injury, if any, flowed solely from the action of state legislatures in enacting the NEC, which excluded PVC conduit. (App. 29a-30a, 31a-32a.)

5. The Court of Appeals Decision

As primary grounds for reversal, the Court of Appeals held *Noerr-Pennington* inapplicable to activities within a private code-making body like the NFPA notwithstanding that the goal of these activities is adoption of the NEC as legislation throughout the nation. In so holding, the court acknowledged, it disagreed with three district courts elsewhere as well as Judge Sprizzo in this case. (App. 12a.)

The Court of Appeals found a vital distinction between "the submission of a group's recommendations to the government," which it deemed to be protected conduct, and "the antecedent conduct which generated those recommendations," which is not protected. (App. 17a.) In a footnote, the Court recognized that under *Parker v. Brown*, 317 U.S. 341 (1943), Carlon could not recover "for any injury arising from the adoption of the NEC by the various governments." (App. 9a n.3.) It concluded, however, that Allied's conduct had "caused independent antitrust injury to Carlon"—that is, injury apart from the exclusion by state legislatures—which "should not be excused merely because its actions also indirectly influenced state and local governments." (App. 17a.)

REASONS FOR GRANTING THE WRIT

The Court of Appeals has held that petitioner's lobbying and voting activity within a private code-making body—which admittedly had as its overriding purpose and ultimate goal the enactment of legislation favorable to it—constituted a Sherman Act restraint of trade punishable by treble damage liability. Though lobbying within the code-making body is the only effective way to influence ensuing legislation, the Court below has held *Noerr* inapplicable because it concluded that this lobbying only "indirectly influenced state and local governments" and was therefore too remote to "constitute petitioning of the government within the meaning" of *Noerr*. (App. 17a.)

The Court of Appeals has also based its decision in critical measure upon the premise that the Sherman Act may serve to proscribe private associational tactics that are otherwise lawful and within the association's rules and that are employed to further the expression of opinion on a matter of public interest and safety if a jury finds those tactics distasteful and "subversive."

The decision is clearly important and questionable under this Court's *Noerr* line of cases; it goes, in our submission, on a cramped and erroneous reading of those decisions. The refusal to accord *Noerr* immunity to lobbying activity within a private code-making association represents a wide extension of Sherman Act liability without precedent in any decided case. Indeed, the precedents directly in point—the three district court decisions cited in the opinion below in addition to the district court decision in this case—reach a conclusion on the *Noerr* issue exactly opposed to that of the Court of Appeals.

Private code-making bodies play an important role in the economic life of the country, as this Court has recognized in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 570 (1982). The decision of the Court of Appeals will severely constrain intra-organizational political conduct within a multitude of private code-making associa-

tions that have long provided the essential framework for state and municipal legislation.

Review by this Court is well merited. First, the decision gives the first federal appeals court answer to an important question of federal law, governed ultimately by sensitive First Amendment considerations. The Court of Appeals' answer cannot readily be squared with this Court's elaboration of the *Noerr* doctrine and with this Court's refusal thus far to outlaw under the Sherman Act political activity that has no direct marketplace impact. Second, the decision will have far-reaching political and economic consequences. If undisturbed, it will chill good-faith debate in private code-making bodies on issues of public concern and thus drastically alter the process by which legislation fixing safety standards, product specifications and licensing requirements has long been formulated at state and local levels.

1. The Court of Appeals decision misconceives the *Noerr* doctrine

The Court of Appeals' misreading of the *Noerr* doctrine begins with its underlying premise that *Noerr* is an exemption to be "construed narrowly" (App. 18a), and applied only to "direct" pressures upon the legislature. This Court held in *Noerr* that

> the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly. . . . [S]uch associations . . . bear very little if any resemblance to the combinations normally held violative of the Sherman Act. . . . And we do think that the question is conclusively settled, against the application of the Act, when this factor of essential dissimilarity is considered along with the other difficulties that would be presented by a holding that the Sherman Act forbids associations for the purpose of influencing the passage or enforcement of laws.

365 U.S. at 136-37. Thus, *Noerr* is in no sense a narrow legislative exemption; it is, rather, in part a constitutionally based doctrine limiting the application of the Sherman Act. *Id.* at 137-38; *see California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11, 515 (1972); Note, *The Noerr-Pennington Doctrine and the Petitioning of Foreign Governments*, 84 Colum. L. Rev. 1343, 1349-52 (1984) (immunity for petitioning has constitutional underpinnings but also reflects legislative intent, expressed in legislative history of Sherman Act, not "to use the antitrust law to regulate domestic efforts to influence the passage or enforcement of laws"); *cf. Hufsmith v. Weaver*, 817 F.2d 455 (8th Cir. 1987) (applying doctrine outside the antitrust area).

Equally important, the distinction drawn by the Court of Appeals between direct and indirect influence upon legislation is neither realistic in fact nor sound in law. The record makes clear that the effective route to Allied's goal was via the NFPA. For, in the words of the opinion below, the NEC is indisputably "the most widely disseminated and adopted model code in the world." (App. 4a.) As the District Court found, parties seeking to be heard with respect to the NEC must join the political process at the NFPA. The road to Albany, Phoenix and Sacramento begins at the NFPA. That Allied might have chosen the tardy and less effective course of lobbying directly the various legislative bodies that enacted the NEC—an alternative the Court of Appeals deems the only protected one—is at best irrelevant under *Noerr*.

In fact, the *Noerr* case involved "indirect" pressures on the legislature that were if anything far more remote from the legislative halls and offices than the pressures brought to bear by Allied through the NFPA. In the vicious struggle from which the *Noerr* case arose, the defendant railroad association had relied, and was protected in relying, upon a deceptive publicity campaign designed to destroy competitor truckers' goodwill and to promote support for legislation shackling the truckers' ability to compete. *See Noerr*, 365 U.S. at 129-30, 133. The deceptive publicity campaign was not aimed directly at the Congress and had the important, if not overriding,

purpose of injuring the truckers "in ways unrelated to the passage or enforcement of law." *Id.* at 133. But its ultimate purpose was to influence Congressional action. Though the conduct was found in substantial measure to be "reprehensible," *id.* at 145, it was protected against Sherman Act sanctions: "[N]o violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws." *Id.* at 135.[6]

The principles of *Noerr* apply here to the influence Allied sought to muster and the legislative goals at which it aimed. Allied's conduct was both more directly aimed at legislative goals and more plainly lawful than that of the railroad industry in *Noerr*. The District Court there found, and this Court accepted as true, "that the railroads' *sole* purpose in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitors for the long-distance freight business." *Id.* at 138 (emphasis added). But that did not transform the railroads' conduct into a Sherman Act violation.[7]

By contrast, Allied engaged in no deception, spoke no untruth and acted not solely for economic reasons but in part, as the jury found, in a good-faith effort to protect the public

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6 The Court added:

> It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed. And it seems equally inevitable that those conducting the campaign would be aware of, and possibly even pleased by, the prospect of such injury. To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns.

Id. at 143-44.

7 *Cf. United Mine Workers of America v. Pennington*, 381 U.S. 657, 670 (1965), construing *Noerr*:

> Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act.

from a product it believed dangerous. And Allied's activities were aimed directly at legislation: the NEC has a far more immediate and obvious legislative impact than the third-party publicity campaign in *Noerr*. Judged by the results, the NEC's influence upon legislation could not be any more direct. It provides the basis for substantially all legislatively enacted electrical codes in states and municipalities around the nation. A majority of states and cities adopt the NEC without amendment and many more do so with only minor amendments.[8]

If the defendants in *Noerr* were protected and if their activities were sufficiently "direct," despite the fact that they too could have confined themselves to pure petitioning, then surely Allied should enjoy similar protection for its effort to influence the passage of laws. Stated this way, the problem comes back into focus. It presents the *Noerr* issue in an apt perspective—a perspective from which three other federal courts, in addition to Judge Sprizzo herein, have reached a legal conclusion opposite to that of the Court below. *See Sessions Tank Lines, Inc. v. Joor Mfg., Inc.*, 1986-1 Trade Cas. (CCH) ¶ 66, 989 (C.D. Cal. 1986), *appeal argued*, No. 86-6208 (9th Cir. Apr. 18, 1987); *Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit Corp.*, 573 F. Supp. 833 (N.D. Ill. 1983); *Rush-Hampton Indus. v. Home Ventilating Inst.*, 419 F. Supp. 19 (M.D. Fla. 1976).

2. The decision below expands the Sherman Act to reach and censor associational activities that are not within the statute

The Court of Appeals decision assumes the answer to a fundamental question which had to be addressed before the Court could logically deal with the *Noerr* immunity issue. The question is whether Allied's actions were Sherman Act restraints in the first instance. We submit that they were not and that the Court wrongly assumed that they were largely on the basis of the jury's "subversion" finding.

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8 See footnote 1 of Court of Appeals decision. (App. 4a-5a.)

In the words of the decision below, the gist of what Allied has been condemned for is that it "packed the annual meeting with newly registered members, whom it subsidized, for the *sole purpose of achieving an anticompetitive result—the exclusion of PVC conduit from the marketplace*." (App. 21a (emphasis added).) But the underscored language begs a prime question—whether Allied's sole purpose was, in effect, to achieve an anticompetitive trade restraint; and it does so by ignoring facts of the most vital importance found by the jury or conceded and by giving decisive weight to the unacceptably vague jury finding of "subversion."

The jury's fact findings—establishing Allied's good faith and its scientifically supported concern about toxicity,[9] Allied's conformity with the NFPA's rules, themselves found to be fair, and Carlon's full and effective access—have not the faintest look or sound of a Sherman Act violation. Without even coming to *Noerr-Pennington*, the findings of the jury show vigorous pressure in an open public arena to promote objectives more than tinged with a public interest. All for partly self-interested motives, to be sure. But the fact that political activity is directed against a competitor and is motivated in part by self-interest has never been thought to abrogate the

9 It bears mention that at the time the NFPA rejected Carlon's proposed TIA, the NFPA Board of Directors took immediate action to remedy the deficiency in its processing of the NEC that had left the toxicity question unanswered at the time Article 331 was presented to the membership. (A. 2840-41.) It established an ad hoc committee of national experts to address the issues of the toxicity and fire hazard associated with PVC. (A. 1582-84, 2841.) In December 1982, the NFPA Board of Directors unanimously established a standing committee to "provide guidance, as needed, to NFPA committees on the toxicity of the products of combustion." (A. 3309.) It also adopted unanimously a Policy Statement reaffirming the NFPA's recognition that "the toxicity of the products of combustion is an important factor in the loss of life from fire" and expressing "concern that the growing use of synthetic materials may produce more toxic or additional toxic products of combustion in a fire environment." The Board also appointed an Advisory Committee to provide specific guidance to the Technical Committees on "questions relating to assessing the hazards of the products of combustion." (*Id.*)

constitutional rights of free speech and association or, standing alone, to bring into play Section 1 of the Sherman Act.

On the jury's specific findings and the conceded facts, Allied was surely exercising its First Amendment rights. The critical factors—largely ignored by the Court of Appeals—are Allied's good-faith belief on a matter of palpable public interest and the "objective validity" of its safety concerns. Again, there was scientific evidence that Carlon's plastic conduit gave off life-endangering fumes when it burned. Allied's expression of its safety concerns about such a product in an open forum is deserving of First Amendment protection and should not have been dismissively characterized as a Sherman Act restraint. And its mustering of support to deny organizational and legislative sanction for that product is simply not the equivalent, practically or morally, of price-fixing. The Court of Appeals' suggestion to the contrary, implicit in its summary rejection of Allied's First Amendment-based defenses and its citation to *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927), is clearly mistaken.

To put the case in context, it helps to note what it is not about. It is not about denial of access to a legislative or administrative body (*cf. California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972)), for the jury found that Carlon had "full and effective access to the NFPA." (A. 474J.) It is not a case of an association adopting unfair rules intended to exclude a competitor from a critical market or deny it an important imprimatur. *Cf. Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985); *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963). Nor does it involve the illicit and fraudulent use of the standard-setting process in support of an anticompetitive end, or direct action in the marketplace by competitors acting together—for example, price-fixing, a group boycott, or an agreement to allocate territories or customers. *Cf. American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982); *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978); *Fashion Originators' Guild of America, Inc. v. Federal Trade Comm'n*, 312 U.S. 457

(1941); *Feminist Women's Health Center, Inc. v. Mohammad*, 586 F.2d 530 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979).

This is not a case involving use of market power at all. Allied used only political power, the power to persuade, to associate with others, and to vote. In rounding up 155 votes (out of a total electorate of 31,500) and otherwise supporting its position, Allied used tactics that were, as Judge Sprizzo observed, in common usage in the Congress and elsewhere in the American political system. (A. 2028-31.) Contrary to the Circuit's negations, Allied was indeed engaged in "political activity" in a "political arena." (App. 19a.)

It should make no difference that the jury accepted the invitation to find that this conduct "subverted" the NFPA process. The jury had no guidance as to the meaning of "subverted." More importantly, we submit, there was no tenable meaning on which the jury could have been permitted to transmute Allied's admittedly crude tactic, found by the jury to be conformable to the NFPA rules and equally available to Carlon, into a Sherman Act violation.

The Sherman Act nowhere prescribes conduct or limits pressure tactics within a private standard-setting organization any more than it does shareholder conduct within a corporation, the internal behavior of members of a partnership or the membership of a club or trade association. So far as the Sherman Act is concerned, it is the *external* result—the outward behavior of the entity—that is to be judged when there is a claimed restraint of trade. If that behavior is price-fixing or a boycott, it violates the Sherman Act. There is no such violation when, as here, the behavior is withholding organizational approval for a product for which there is objective, scientific evidence of life-endangering toxicity.

To say that the result came from "subversion" of the entity's own rules of procedure or decision is not to say anything relevant under the Sherman Act. On the contrary, to fashion sanctions on such a theory moves unacceptably toward restricting "the practice of persons sharing common views banding together to achieve a common end"—a practice "deeply embedded in the American political process." *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294 (1981). As the cited case reminds us, limiting how much people may give or what they may do to bring their associations to support their interests is a subject highly sensitive under the First Amendment, quite without regard to special doctrines like *Noerr-Pennington*. Even if some people were brought to support associational goals by "intimidation" or "threats," this could not be a ground of proximately caused damages and recovery consistent with the rights assured by the First Amendment. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 921-22 (1982).

3. The decision below misreads the theory and nature of Carlon's damage claim in its analysis under both *Noerr* and *Parker v. Brown*

There is another gap in the Court of Appeals' antitrust analysis. In and of itself, Allied's vote packing and other activity at the NFPA meeting—the supposedly unprotected "antecedent conduct" cited by the Court of Appeals (App. 17a)—caused Carlon no harm. Carlon suffered injury only when state and local legislatures enacted the NEC without Article 331. (*See, e.g.*, Complaint paras. 13, 30, A. 17, 24.) But that brings the case squarely within the *Noerr-Pennington* rule and within *Parker v. Brown*, 317 U.S. 341 (1943).

The Court of Appeals decision skips over this issue by misreading the trial record on Carlon's damage theory and by assuming that Carlon went to the jury on the theory that the NFPA vote "stigmatized" its product and that Allied "marketed" the stigma. (App. 9a & n.3.) In truth, Carlon suffered, claimed, and proved damages only for injury attributable to legislative enactment of the NEC: the only theory on which Carlon litigated the case, from complaint through trial openings, summation and verdict, was that the "adoption and application of the NEC by states and municipalities" excluded its ENMT product from the market (Complaint para. 30, A. 24). Reflecting the complaint, the record contains no evidence supporting the "stigma" theory or indicating that Allied "mar-

keted" the stigma, as the court phrased it. Judge Sprizzo did *not* submit the stigma theory to the jury because it was never claimed by Carlon during the trial and because there was no evidence introduced to support it. Judge Sprizzo emphatically made this point when Carlon first presented the stigma theory during the post-trial argument of the *Noerr* issue. (*See* App. 29a-30a, 31a-32a.)[10]

The point is significant. Once the stigma misconception is eliminated, Carlon's injury is seen to flow from what the legislatures did or did not do. That is, either Allied's action was causally related to the legislatively enacted exclusion Carlon suffered—the only harm Carlon suffered—in which case *Noerr* and *Parker v. Brown* exempt it, or it was not so related, in which case Carlon had no claim at all.

4. The decision will have widespread and profound impact, chilling useful and desirable code-making activity

The result of imposing liability in circumstances like the ones in this case must be to limit debate within code-making bodies. Few will want to participate if they can suffer antitrust liability even though they act within the code-making group's rules and regulations, the rules and regulations are lawful and the complaining party is not deprived of full and effective access to the code-making process. Few firms will want to risk antitrust exposure for getting into the trenches to promote their view, no matter how well based, that another's product is unsafe or untested or is otherwise hazardous. *See, e.g.*, Wachtel, *Products Standards and Certification Programs*, 13 Antitrust Bull. 1, 3 (1968) (pointing out that potential antitrust liability deters businessmen from participating in desirable industry-wide consumer protection activity).

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10 Judge Sprizzo called the argument a "distortion" (A. 2045) of what was presented to the jury and stated: "I think your theory of damages all along was that your damages flowed from the fact that you were not approved and therefore not adopted by the state legislatures involved." (A. 2046.)

The potential harm to the public interest is substantial. The NEC is one of some 32,000 codes and standards promulgated by over 420 private organizations.[11] The NFPA itself promulgates 260 separate codes and standards relating to fire safety and fire protection.[12]

As the Federal Trade Commission and Department of Justice noted in their brief as *amici curiae* in the Court of Appeals outlining the importance of this case, "[c]odes and standards promulgated by organizations like NFPA influence the policies of numerous states and cities." (Brief at 6.) Industry relies heavily on these standards and codes; state and local governments enact them, particularly the NEC; and government regulations incorporate many by reference.[13] In preparing these codes and standards, model code groups perform a vital, beneficial public service. *See, e.g.*, House Select Comm. on Small Business, *The Effect Upon Small Business of Voluntary Industrial Standards*, H.R. Rep. No. 1981, 90th Cong., 2d Sess. 3, 75 (1968). They provide technical expertise unavailable at most government agencies or within state or local governments. And they supply "real world experience" that government employees may lack. *See* Hamilton, *supra*, at 1377-78 & n.11. State and local legislatures depend on the thorough ventilation of issues within the NFPA and other code-making groups, and they depend on just such interested parties as Allied (and Carlon) to present their views at the NFPA or in other public forums.

In effect, the NFPA and other code-making associations become the legislature's committee rooms and scientific labo-

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11 *See*, National Bureau of Standards, Special Pub. No. 681, *Standards Activities of Organizations in the United States* 1 (Aug. 1984).

12 *Id.* at 2; *see* Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 Tex. L. Rev. 1329, 1339 (1978).

13 *See, e.g.*, 29 C.F.R. § 1910.66(c)(22)(i) (1986); 33 C.F.R. § 183.435(a)(1) (1986); 42 C.F.R. § 52b.11(b)(3) (1986); 42 C.F.R. § 57.112 app. A, para. (e) (1986); 46 C.F.R. § 63.05-85(b) (1986); and 49 C.F.R. § 192.163(e) (1986) (all incorporating the NEC by reference).

ratories. Within those organizations the scientific and technical data are developed and analyzed, the sources of information come together, the debate is joined, and the process of advocacy and persuasion is most intense. That is where the flow of information must be freest. That is where participants need the greatest elbow room—freedom to lock horns, to err, on occasion to use overly robust tactics without facing treble-damage antitrust liability. In *Noerr*, this Court recognized the need for such latitude to enable interested parties to participate freely in the legislative process, even to the point of excess. *See* 365 U.S. at 139.[14]

The constricting or inhibition of model code-making activity will also have broad ripple effects. Smaller jurisdictions do not have the staff or funds to develop their own codes. Larger jurisdictions will have to divert resources from other vital services if they do not get the benefits of model code-making activity. *See* Wachtel, *supra*, at 7. Impairment of the effectiveness of model code organizations may well lead to the chaos of different codes in each jurisdiction, greatly increasing the risk that unsafe products or building activities will be approved or overlooked.

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14 As the Supreme Court recently reminded us, our form of government is predicated on the pluralistic belief that the people will act according to their own self-interest and that "the summation of these individual pursuits will further the collective welfare." In this day of interest-group politics, it is essential that the right to petition to the legislative, executive, administrative, and judicial arms of the government be zealously safeguarded.

Handler & DeSevo, *The Noerr Doctrine and Its Sham Exception*, 6 Cardozo L. Rev. 1, 55 (1984) (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 1987

APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 534, 735—August Term, 1986

(Argued: January 20, 1987 Decided: April 22, 1987)

Docket Nos. 86-7734, -7758

INDIAN HEAD, INC.,

Plaintiff-Appellant, Cross-Appellee,

— against —

ALLIED TUBE & CONDUIT CORPORATION,

Defendant-Appellee, Cross-Appellant.

Before:

LUMBARD, KEARSE, and PRATT,

Circuit Judges.

Indian Head, Inc. appeals from a judgment notwithstanding a jury verdict, entered in the Southern District

by Judge John E. Sprizzo, holding that defendant Allied Tube & Conduit Corp.'s attempts to influence a private standard-setting organization were protected from antitrust scrutiny under the *Noerr-Pennington* doctrine. Allied cross-appeals, arguing that, as a matter of law, its behavior did not constitute a violation of the antitrust laws.

Judgment n.o.v. vacated and remanded with directions to reinstate the jury's award.

FREDRIC W. YERMAN, New York, N.Y. (Kaye, Scholer, Fierman, Hays & Handler, New York, N.Y., Michael Malina, Ira S. Sacks, Richard A. De Sevo, Bert L. Slonim, Donna M. Gerber, of counsel), for Plaintiff-Appellant Indian Head, Inc.

FRANK H. WRIGHT, New York, N.Y. (Grand & Ostrow, New York, N.Y., Allison Manning, Michael D. Rips; Lison & Barrett, Chicago, Illinois, John M. Lison, of counsel), for Defendant-Appellee Allied Tube & Conduit Corporation.

ROBERT D. PAUL, General Counsel, Federal Trade Commission, Washington, D.C. (Ernest J. Isenstadt, Assistant General Counsel, Dean C. Graybill, Michael Goldenberg, Attorneys, Federal Trade Commission, Washington, D.C., of counsel), as Amicus Curiae.

DOUGLAS H. GINSBURG, Assistant Attorney General, Department of Justice, Washington, D.C. (W. Stephen Cannon, Deputy Assistant Attorney General, Catherine G. O'Sullivan, Marion L. Jetton, Attorneys, Department of Justice, Washington, D.C., of counsel), as Amicus Curiae.

LUMBARD, *Circuit Judge*:

This case requires us to decide whether federal antitrust laws apply to attempts to influence the promulgation of a code of safety standards by private industry. In its complaint, plaintiff Indian Head, Inc. (Carlon) charged that defendant Allied Tube & Conduit Corp. had conspired to prevent inclusion of Carlon's product in industry standards. The jury found for Carlon, and awarded it $3.8 million in damages (before trebling). Carlon now appeals from a judgment for defendant, notwithstanding the jury verdict, entered by Judge John E. Sprizzo in the Southern District on July 31, 1986. Judge Sprizzo reasoned that the doctrine developed in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.8. 127 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965), which protects petitioning of the government from Sherman Act scrutiny, also protects attempts to influence a private standard-setting organization where, as here, governments routinely incorporate that organization's standards into their legal codes. Allied cross-appeals, claiming that, as a matter of law, its conduct did not constitute an unreasonable restraint of trade. We vacate the judgment n.o.v. and remand with directions to reinstate the jury's award.

I.

The evidence presented to the district court established the following: Carlon, a division of Indian Head, Inc.,

manufactures and sells flexible plastic electrical conduit made from polyvinyl chloride (PVC). Electrical conduit is hollow tubing used in building construction to carry insulated electrical wires through floors, walls, and ceilings, and outside buildings, and to protect the wires from damage or abuse. Carlon's product competes in the marketplace against steel conduit, of which Allied is the largest producer in the United States. Carlon claims that PVC conduit has a number of significant competitive advantages over steel conduit, including its pliability, its lower installed cost, and its lower susceptibility to short circuiting. On the other hand, as the district court instructed the jury, "there is a scientific basis for a concern about safety of PVC products with respect to toxicity. . . . the parties do not dispute that people disagree on the issue and there is an objective basis for a concern for safety." Allied particularly stresses the fact that, during fires in high-rise structures, PVC conduit may burn, emitting toxic smoke and fumes.

This case arises from Allied's efforts to block Carlon's proposal to include PVC conduit as a permissible type of electrical conduit in the 1981 edition of the National Electrical Code (NEC)—a model code, promulgated by the National Fire Protection Association (NFPA), which establishes product and performance requirements for electrical systems, including electrical conduit. The parties agree that NEC is the most widely disseminated and adopted model code in the world. The parties agree further that a substantial number of state and local governments adopt the NEC as law in whole or in part.[1]

[1]A survey, conducted by Allied and submitted to the district court in the Post-Trial Affidavit of John Lison, Allied's Vice President and General Counsel, shows the extent of the governmental reliance upon the NEC as of June, 1982: Of the 51 jurisdictions surveyed (50 states and the District of Columbia), 26 adopted the NEC through the process of incorporation by reference, without changing a word; an additional 19 adopted the NEC with amendments; those jurisdictions which amended the NEC before adopting it on average changed only 12 of its 114 articles; none of the remaining six adopted their own electrical code. Allied's survey also included all cities over 100,000 and a select group of 450 cities whose population exceeded 25,000. 495 cities responded, all with their own electrical code: 232 cities adopted the NEC exactly as written; 256 cities adopted the NEC and made amendments to it, on average changing only 11 articles.

Every three years, the NFPA—a private, voluntary organization composed of over 31,500 individual and group members representing industry, labor, academia, insurance, organized medicine, firefighters, and government—revises the NEC through a multi-step, several-year-long process. The NFPA first submits proposed amendments to the NEC to a Code-Making Panel (CMP) made up of professionals with technical expertise in the area. In order to prevent domination by special interests, no more than one-third of any CMP's membership may represent a single interest. If approved by the CMP, a proposal then goes to the full membership, together with the comments and voting position of each CMP member. After the membership has had an opportunity to comment on the proposal, the CMP considers it a second time, along with the membership's comments. If again approved, the NFPA publishes the proposed amendment to the full membership. The entire membership then votes.

In 1980, when Carlon's proposal was being considered, a simple majority of those present at the annual meeting was sufficient to approve or reject a proposal. Disappointed members can appeal the membership's vote to NFPA's Standards Council and ultimately to its Board of Directors. Finally, NFPA rules also permit *de novo* review

of a defeated proposal by the CMP, the Standards Council, and the Board of Directors, in a procedure known as a Tentative Interim Amendment (TIA). If adopted, a TIA includes or excludes a proposal on an interim basis until the next code cycle.

On September 18, 1978, Carlon began the process of obtaining NEC approval for PVC conduit by submitting its proposal, known as Article 331, to the NFPA, along with a fact-finding report by the Underwriters Laboratories. The NFPA directed the proposal to CMP-8, which initially rejected it. However, in December, 1979, based on further fact finding and field demonstrations by Carlon, CMP-8 reversed its earlier decision and approved Article 331 for review by the full membership. The NFPA then scheduled the article for consideration by the full membership at the next annual meeting, to be held in Boston in May, 1980.

Recognizing that inclusion of PVC conduit in the NEC might adversely affect its sales of steel conduit, Allied's representatives met with a number of different groups, including other members of the steel industry, to gather votes in opposition to Article 331. On January 30, 1980, the Steel Rigid Conduit and Electrical Section of the National Electrical Manufacturers Association (NEMA) held a meeting to discuss the matter. At that meeting, and at a full meeting of the NEMA Steel Section held in February, everyone agreed to bring as many voters as possible to the upcoming NFPA meeting; Allied itself pledged to bring at least 100 people to vote against Article 331. Additional meetings and communications were held among the steel interests to coordinate their efforts to block Article 331's adoption. Acting within the letter of NFPA rules, Allied eventually arranged for 155 persons—including

employees, sales agents, the agents' employees, company executives, employees of two of Allied's divisions, and the wife of the national sales director—to join the NFPA, to register as voting members, and to attend the annual meeting to vote against the proposal. Allied also paid over $100,000 for the membership, registration, and attendance expenses of these voters. The other steel interests similarly recruited and paid for the expenses of voters at the May, 1980 meeting. In total, the steel interests gathered 230 votes.

Carlon made no attempt to sign up additional employees or sales agents other than the four already scheduled to attend the meeting. Until about April 18, 1980, H.F. van der Voort, who coordinated Carlon's efforts to amend the NEC, apparently believed that the NFPA's rules did not permit a motion from the floor to return Article 331 to CMP-8. On or about April 18, van der Voort discovered that such a motion could, in fact, be made. By this time, Carlon could not have signed up additional members to vote at the May meeting; under NFPA rules, only those who have been NFPA members for at least 30 days could vote at an annual meeting. However, Carlon did solicit support from members of the Society of Plastics Industry, the NEMA plastics section, other members of the plastics industry, NFPA's railroad and health care sections, and the Fire Marshals Association of North America.

At the annual meeting, Allied instructed its personnel where to sit, based upon a detailed seating chart, and appointed group leaders to instruct the voters "how the discussion is progressing and how to vote." Boxed lunches were provided and the voters were told to "stay nailed to their seats" until the end of two evening sessions. Group

leaders used walkie-talkies and hand signals to facilitate communication. Few of Allied's voters had any of the technical documentation necessary to follow the meeting; nor did any of them speak in opposition to Article 331 in the course of the meeting.

Two votes were taken on the motion to return Article 331 to CMP-8. The first, a voice vote, was inconclusive. The second, a standing vote, approved the motion by a vote of 394-390. To insure its victory, Allied insisted that its representatives remain in their seats until 2:00 a.m., when the NFPA membership voted to approve the entire NEC, without Article 331. Carlon immediately appealed the decision of the membership to the Standards Council, which referred the appeal to the Board of Directors. Finding that the NFPA rules had been circumvented but not violated, the Board denied the appeal, and returned Article 331 to the CMP-8. In June, 1980, Carlon applied for a TIA including Article 331 in the 1981 NEC. After the proposed TIA wound its way through the various levels of the code-making process, encountering opposition by Allied at each step, a subcommittee of the Board of Directors found that Carlon's request was not sufficiently exigent to warrant issuance of the TIA.

Carlon commenced this action against Allied and the NFPA on October 9, 1981, alleging that they, the American Iron & Steel Institute, other steel conduit manufacturers, and Allied's independent sales agents had "combined and conspired to prevent competition from non-metallic tubing by excluding it from the 1981 NEC" by "subverting the consensual standards rules and procedures of the NFPA."[2] After extensive pretrial proceedings,

[2]Prior to trial, Carlon discontinued with prejudice its action against the NFPA.

a bifurcated trial commenced on March 4, 1985 before Hon. John E. Sprizzo and a jury. Prior to the submission of the liability issues to the jury, Allied conceded that it had a pecuniary or commercial interest in seeing that PVC conduit was not included in the NEC; Allied also admitted that it had agreed with the other steel companies to oppose Article 331.

After four days of deliberation, the jury returned its verdict and also answered specific interrogatories submitted by the court. The jury found that Allied's conduct subverted the consensus standard-making process of the NFPA, and constituted an unreasonable restraint of trade in violation of the antitrust laws. Judge Sprizzo then charged the jury on Carlon's theory that it was injured by the stigma of its exclusion from the 1981 NEC and Allied's marketing of that exclusion.[3] Relying upon these instructions, the jury found that "as a proximate result of Allied's unreasonable restraint of trade in violation of the antitrust laws," Carlon lost $3.8 million in profits.

Following the trial, Allied moved for a judgment n.o.v., or, alternatively, for a new trial. Allied claimed that the *Noerr-Pennington* doctrine and the first amendment barred entry of judgment in Carlon's favor and attacked on various grounds the court's charge and the jury's findings. Judge Sprizzo rejected the charge and jury findings

[3]Carlon alleged that the stigma of not obtaining NEC approval of its product and Allied's "marketing" of that stigma caused independent marketplace harm to Carlon in those jurisdictions permitting use of PVC conduit, as well as those which later adopted the 1984 NEC, which permitted use of PVC conduit in buildings less than three stories high. It did not seek redress for any injury arising from the adoption of the NEC by the various governments. *See Parker v. Brown*, 317 U.S. 341 (1943) (state action doctrine). The district court instructed the jury accordingly. Allied does not challenge the correctness of, or the foundation for, the jury's computation of the damage resulting from that stigma.

challenges but held that the *Noerr-Pennington* doctrine required that the jury's verdict be set aside.

II.

The *Noerr-Pennington* doctrine originated in a trilogy of Supreme Court cases. The Court first focused upon the tension between the first amendment and the Sherman Act in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). As part of an "economic life or death" struggle between the railroads and the emerging trucking industry over control of the long distance freight hauling market, the railroads began a deceptive publicity campaign designed to destroy the truckers' goodwill among their customers and the general public, and to advocate legislation that would hamper the trucking industry's ability to compete against the railroads. In a unanimous opinion authored by Justice Black, the Court reversed the judgment for the truckers, holding that Congress had not intended the Sherman Act to apply to "activities compris[ing] mere solicitation of governmental action with respect to the passage and enforcement of laws." *Id.* at 138.

While noting the "essential dissimilarity" between joint efforts to seek legislation and "agreements traditionally condemned by § 1 of the Act," *id.* at 136, the Court primarily feared that an expansive construction of the Act "would raise important constitutional questions" regarding the right to petition the government guaranteed by the first amendment. *Id.* at 138. The Court refused to "lightly impute to Congress an intent to invade these freedoms," *id.*, especially because the legislative history of the Act provided no basis for concluding that the purpose of the Act was "to regulate, not business activity, but political activity . . . ." *Id.* at 137. Notwithstanding, the Court cautioned: "There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." *Id.* at 144.

In *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965), the Supreme Court extended *Noerr's* exculpatory principles to attempts to influence the executive branch; the Court held that *Noerr* protected the efforts of large mine owners and union officials to squeeze out smaller coal producers by persuading the Secretary of Labor to raise minimum wage levels. Justice White stated that, "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." *Id.* at 670.

The last of the trilogy, *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), made three important contributions to the development of the doctrine: First, the Court applied *Noerr* to administrative and adjudicative proceedings. Second, it provided the Supreme Court's first application of the "sham" exception foreshadowed in *Noerr*: The Court held that a group of trucking companies' opposition to each and every license application made by their competitors "'with or without probable cause, and regardless of the merits of the cases,'" did not deserve *Noerr-Pennington* immunity. Finally, in so holding, *California Motor Transport* made clear that the *Noerr-Pennington* doctrine rested squarely upon the first amendment rights of petition and association. *Id.* at 510-12.

Noting that "the decision of the NFPA will be largely determinative of what the legislatures do," the district court concluded that there was "an intent to influence legislative action through the NFPA in this case, which is protected by *Noerr-Pennington*." Three previous district court decisions have reached similar conclusions. *Sessions Tank Lines, Inc. v. Joor Manufacturing, Inc.*, 1986-1 Trade Case (CCH) ¶ 66,989 (C.D. Cal. 1986) (Western Fire Chiefs Association), *appeal docketed*, No. 86-6208 (9th Cir.); *Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit Corp.*, 573 F. Supp. 833 (N.D. Ill. 1983) (NFPA); *Rush-Hampton Industries v. Home Ventilating Institute*, 419 F. Supp. 19 (M.D. Fla. 1976) (Southern Building Code Congress; International Conference of Building Officials; Building Officials and Code Administration International). These decisions rely upon two intertwined yet separable strands of argument: First, because state and local governments routinely enact the NEC into law, the NFPA takes on a "quasi-legislative" nature. Therefore, the argument goes, under *Noerr-Pennington*, attempts to influence the NFPA may be equated with attempts to influence the government. Second, because the NEC forms the basis for a substantial number of governmental codes, Allied's conduct should be construed as an indirect petition to state and local governments. As we conclude that Allied's "ballot stuffing"—a subversion of the NFPA code-making process—should not be deemed governmental petitioning, we find neither of these arguments persuasive.

A.

We decline Allied's invitation to extend *Noerr-Pennington* immunity to lobbying activities directed toward a "quasi-legislative" body such as the NFPA.[4]

[4]Allied has stipulated that the NFPA is a "private, *non-governmental* organization." (emphasis added). Moreover, Allied has made no claim of any official delegation of governmental power to the NFPA. Thus, the NFPA's alleged "quasi-legislative" status results solely from the *de facto* "delegation" of law-making authority evinced by the extent of the reliance of the various governments upon the NEC.

First, the policies which underlie the doctrine do not warrant such an extension. *Noerr's* holding depended upon the unique nature of petitions directed to the government in our political system: Justice Black focused upon the "right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws . . . ." 365 U.S. at 139. He explained that, "[i]n a representative democracy such as this, . . . government act[s] on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Id.* at 137. The Court feared that applying the Sherman Act to "disqualify people from taking a public position on matters in which they are financially interested" could "deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them." *Id.* at 139. Moreover, "such a holding would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade." *Id.* at 137.

These concerns do not apply with equal force to private organizations. Ideally, a legislature acts in the public interest. If it fails to do so, its members must answer to the constituents they represent. We must therefore allow an unrestricted flow of information to the government to ensure a complete consideration of the issues, secure in the reasonable expectation that our representatives will

act in the public interest. No similar safeguards exist to prevent a private organization from adopting policies contrary to the interests of the general public—in the instant case, establishing an anticompetitive restraint of trade. *See American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 571 (1982) (standard-setting organizations may "be rife with opportunities for anticompetitive behavior"); *see generally* Hurwitz, *Governmental Process, the First Amendment, and the Boundaries of* Noerr, 74 Geo. L.J. 65, 90-93 (1985).

As the Supreme Court stated in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 45 (1985), "[w]e may presume, absent a showing to the contrary, that [a government] acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf." *See also Hydrolevel, supra*, 456 U.S. at 571 ("Although, undoubtedly, most serve [private standard-setting organizations] without concern for the interests of their corporate employers, some may well view their position . . ., at least in part, as an opportunity to benefit their employers."). A private organization's agenda often will not coincide with, and may be directly contrary to, the interests of the broader public. Neither the organization, its membership, nor its leadership is checked by any accountability to the general public. Moreover, even if the organization attempts to act in accordance with its conception of the public interest, that conception is necessarily colored by the composition of its membership. *See* Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 Tex. L. Rev. 1329, 1380-86 (1978) (private standard-setting organizations may not provide "sufficient participation by consumers, workers, and small business," and may not give

"adequate consideration" to "certain noneconomic interests in developing a consensus when most of the participants are representatives of economic interests").

Our concern that these organizations might operate contrary to the public interest becomes particularly acute in view of their importance within the economy. A private standard-setting organization "wields great power in the Nation's economy." *Hydrolevel, supra*, 456 U.S. at 570. The standards it develops and their interpretations "'may result in economic prosperity or economic failure, for a number of businesses of all sizes throughout the country,' as well as entire segments of an industry." *Id.*, quoting H.R. Rep. No. 1981, 90th Cong., 2d Sess., 75 (1968).

Second, extending *Noerr-Pennington* to such "quasi-legislative" bodies would raise serious practical problems: How many and which governmental bodies must enact a code before the organization takes on a quasi-legislative nature? To what extent does a code have to be enacted? If the governmental bodies decide to amend a code before adopting it, how extensive can the changes be before the members of the organizations lose *Noerr-Pennington* protection? The difficulty of answering such questions underscores the differences between petitioning a governmental body and lobbying a private organization.

Thus, we find Judge Wisdom's opinion in *Feminist Women's Health Center, Inc. v. Mohammad*, 586 F.2d 530 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979), to be persuasive authority. In *Mohammad*, an abortion clinic claimed that members of a nearby hospital's OB-GYN staff had conspired to restrain trade in the abortion market in the Tallahassee area. The defendant physi-

cians had communicated their concerns about the ethics of some of the clinic's practices to a private organization of area physicians, to the Executive Director of the Florida Board of Medical Examiners (BOME), and to the head of residency at another hospital. At the same time, the physicians discussed their concerns amongst themselves. The district court granted summary judgment to the doctors, holding that the communications and discussions were protected under *Noerr-Pennington*.

The Fifth Circuit disagreed. The court distinguished between the communications addressed to the BOME, "a creature of state law," *id.* at 542, and the other communications. The former were "a form of activity . . . protected by the *Noerr-Pennington* doctrine absent proof of sham." *Id.* However, this protection did not extend to the other communications, even though state statutes vested the recipient organizations "with a kind of quasi-legislative authority." *Id.* at 545. State statutes permitted the BOME to take action against physicians disciplined by private medical groups, but did not require that it do so. Therefore, Judge Wisdom concluded, "[h]ospital medical staffs and medical societies play an important role in Florida's regulatory scheme, but that role is not a governmental one." *Id.* (footnotes omitted).

We believe that *Mohammad* has application here. State and local governments are no more required to enact the NEC into law than the BOME was required to act upon the conclusions of the private disciplinary groups in *Mohammad*. The fact that governments usually do accept the recommendations embodied in the NEC does not transform the NFPA into a governmental organ; consequently, attempts to influence the NFPA, a private organization, cannot claim *Noerr-Pennington* protection. *See*

also United States v. Johns-Manville Corp., 259 F. Supp. 440, 452-54 (E.D. Pa. 1966) (recognizing that activities designed "to influence the decision of public officials" are protected under *Noerr-Pennington*, but refusing to grant summary judgment dismissing claims that defendant conspired to bring about the adoption of anticompetitive pipe specifications by two private organizations).

B.

We also reject Judge Sprizzo's conclusion that Allied's "intent to influence legislative action through the NFPA" brought its activities within the bounds of *Noerr-Pennington*. Allied's behavior, which itself caused independent antitrust injury to Carlon, should not be excused merely because its actions also indirectly influenced state and local governments. Simply put, Allied's conduct did not constitute petitioning of the government within the meaning of *Noerr-Pennington*; rather, its conduct was a subversion of the legitimate purposes of the NFPA.

First, in deciding whether group action falls within the bounds of *Noerr-Pennington*, several courts of appeals have drawn a distinction between the submission of a group's recommendations to the government and the antecedent conduct which generated those recommendations. In *Mohammad, supra*, the Fifth Circuit distinguished between the actions of medical review committees in "reporting disciplinary findings and suspected violations to the BOME [which] may be petitioning activity within the meaning of the first amendment," and "communications within those groups[, which] are not." 586 F.2d at 545. Similarly, in *Litton Systems, Inc. v. American Telephone & Telegraph Co.*, 700 F.2d 785 (2d Cir. 1983), we refused to grant *Noerr-Pennington* protection to a conspiracy to establish an anticompetitive

tariff merely because the tariff was eventually filed with the FCC. We noted that "[t]he decision to impose and maintain the interface tariff was made in the AT&T boardroom, not at the FCC." *Id.* at 807. The fact that the FCC "might ultimately set aside" the tariff did "not transform AT&T's independent decision . . . into a 'request' for governmental action or an 'expression' of political opinion." *Id.* (footnote omitted). *See also United States v. Southern Motor Carriers Rate Conference, Inc.*, 702 F.2d 532, 542 (5th Cir. 1983) (*Noerr* does not protect collective action by common carriers to establish anticompetitive rates which are eventually submitted to the state regulatory commission, but does protect the submission of those rates), *aff'g en banc*, 672 F.2d 469 (5th Cir. 1982), *rev'd on other grounds*, 471 U.S. 48 (1985). These decisions control the instant case.

Second, the district court's application of the *Noerr-Pennington* doctrine contravenes the maxim that "exemptions from the antitrust laws must be construed narrowly." *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119, 126 (1982). The policies behind the *Noerr-Pennington* doctrine—protecting the right to petition the government and insuring an uninhibited flow of information to governmental representatives—do not require that Allied's anticompetitive behavior be ignored. Allied might have made its views known, and provided all the information it deemed relevant, by directly petitioning state and local governments at the adoption stage.

Nor are we swayed by Allied's contention that, because of the heavy reliance placed upon the NEC by various governments, the only effective method of influencing these governments is through the NEC amendment process. Allied's own survey shows that over half the states

and cities polled either amended the NEC before adopting it or refused to adopt it at all. As the district court acknowledged, "there is obviously an opportunity to change the mind of the legislature and . . . there is an opportunity for the defendant and the plaintiff to lobby at that level . . . ."

Allied finally argues that a refusal to accord its behavior *Noerr-Pennington* protection would be inconsistent with the Supreme Court's grant of that protection to the railroad's publicity campaign in *Noerr*. *See also Federal Prescription Service v. American Pharmaceutical Association*, 471 F. Supp. 126, 130 (D.D.C. 1979) (efforts to solicit support in a campaign to induce governmental action "were at least indirect attempts to influence governmental behavior" deserving protection), *aff'd*, 663 F.2d 253, 262 n.6 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982). That holding, Allied contends, authoritatively abolishes any distinction between "direct" and "indirect" petitioning. However, in *Noerr*, the Court held that the railroad's publicity campaign did not violate the antitrust laws because "a publicity campaign to influence governmental action falls clearly into the category of political activity" to which the Sherman Act does not apply. 365 U.S. at 140-41. Congress, the Court concluded, had not intended the Sherman Act to have "application in the political arena" as "Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities . . . ." *Id.* at 141. Allied cannot similarly claim that its conduct constituted "political activity" conducted within the "political arena."

III.

On cross-appeal, Allied claims that, as a matter of law, its conduct did not constitute an unreasonable restraint of

trade.[5] First, Allied argues that an industry participant in a private standard-setting organization should not be held liable under the antitrust laws where a genuine safety concern at least partially motivates its involvement in the process; the organization's rules prevent domination by commercial interests and accord due process to the participants; and objective scientific evidence supports the resulting standard. *Cf. Hydrolevel, supra,* 456 U.S. at 577 ("And in this case, we do not face a challenge to a good-faith interpretation of [a private] code reasonably supported by health or safety considerations."). Allied points out that the fear of treble damages and judicial second-guessing might chill participation by financially interested industry members, who have an incentive to undertake the costly process of generating and gathering costly safety information. *See, e.g.,* M. Olsen, *The Logic of Collective Action: Public Goods and the Theory of Groups* (1971) at 14-16. Moreover, while judges are specialists in procedural fairness, they will often have little expertise in the substantive area to which a standard applies. *Cf., e.g., Kletschka v. Driver,* 411 F.2d 436, 443 (2d Cir. 1969) (The infeasibility of reviewing every decision and the lack of technical expertise in the substantive area means that "the courts should seek to discourage arbitrary agency action by enforcing the various procedural rights . . . and not by

[5]As part of its cross-appeal, Allied also urges that the district court improperly submitted a separate special jury interrogatory asking whether Allied's opposition to Article 331 constituted the "least restrictive means" of expressing opposition to PVC conduit. Carlon argued to the court that the answer was potentially dispositive. Even though Judge Sprizzo disagreed with Carlon's legal theory, he did not abuse his discretion by submitting the question to the jury in order to avoid the possibility of a retrial, *see Litton Systems, supra,* 700 F.2d at 803 & n.19, particularly because he made clear to the jury that the existence of less restrictive means "was not dispositive" of and was only "tangentially related" to Carlon's antitrust claim.

undertaking a full substantive review of the justification for the decision.").

However, in this case, Allied violated the integrity of the NFPA's procedures. The jury found that, although Allied acted within the letter of the NFPA's rules, its conduct "subverted" the code making process which Allied admits contained an inherent "potential for abuse." The record substantiates this conclusion: the steel interest's recruitment of the 230 members for a single vote gave it a disproportionate voice, inconsistent with the concept of "consensus" standard making; few of Allied's recruits had the knowledge or inclination to make an independent decision on the merits of the issue; the industry reacted negatively to what the trade magazines termed the conversion of NFPA's "code-making process . . . into a battleground for establishing commercial preference for competing product types;" on Carlon's appeal, the NFPA Board of Directors found that Allied had "circumvented" NFPA rules; Jack Sanders, chairman of an NFPA committee formed to review its voting procedures after the May, 1980 meeting, testified that Allied's actions were inconsistent with the intent of those procedures; following, and as a direct result of, Allied's conduct, the NFPA amended its rules to prevent a recurrence of the PVC conduit vote; finally, Judge Sprizzo sustained the jury's verdict against Allied's challenges. In short, Allied packed the annual meeting with newly registered members, whom it subsidized, for the sole purpose of achieving an anticompetitive result—the exclusion of PVC conduit from the marketplace. We refuse to permit a defendant to use its literal compliance with a standard-setting organization's rules as a shield to protect such conduct from antitrust liability.

Nor do we find any merit in Allied's claim that it should not be held liable under the antitrust laws because the exclusion of PVC conduit from the 1981 NEC was supported by objective scientific evidence. The "objective validity" of a restraint has never been a defense to an antitrust charge, cf. *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927) (reasonableness of price is not a defense to a price fixing charge).

IV.

The judgment of the district court is vacated and remanded with directions to reinstate the jury's award.

APPENDIX B

Opinion of the United States District Court for the Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 Civ. 6250

INDIAN HEAD, INC.,

Plaintiff,

—against—

ALLIED TUBE & CONDUIT CORP., etc.,

Defendant.

New York, N. Y.
June 27, 1986
11:50 a.m.

Before:

HON. JOHN E. SPRIZZO,

District Judge.

APPEARANCES:

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
Attorneys for Plaintiff
BY: FREDRIC W. YERMAN, Esq.
IRA S. SACKS, Esq.

GRAND & OSTROW
Attorneys for Defendant
BY: FRANK WRIGHT, Esq.
ALLISON MANNING, Esq.

THE COURT: As I have indicated, I am prepared to rule from the bench. The following will constitute the Court's opinion, which, subject to editorial changes which may be made when I receive the transcript, will constitute the opinion and order of the Court.

I should make it clear at the outset that I have reviewed the briefs and considered all the arguments made by the defendant to justify setting aside the verdict in this case. I do not find

them, as I have indicated, meritorious. I think the Court's charge with respect to the rule-of-reason analysis was in all respects correct. I think the defendant has distorted that charge by their emphasis on the least-restrictive-means question which was put to the jury. I think the Court made it very clear that was a factor for the jury to consider and was not dispositive.

The Court is not satisfied that there was any inconsistency in the jury's answers to the questions, because the Court is satisfied that you could subvert the spirit of the NFPA rules while at the same time complying with the letter of those rules, as indeed the appeal of this case to the NFPA Appeals Council tends to show.

I also find that the fact that you have an effective appeal does not in any way detract from the jury's finding that the conduct in which the parties engaged had the impact of subverting what the consensus-making standards of the NFPA were designed to do in the first place. It may very well be that when something takes place at the lower level of a proceeding, that impacts to some extent the appeal, even if the appeal would otherwise be an effective appeal and even if the ultimate decision is made by an appellate court. Obviously, things may happen at the trial which for one reason or another an appellate court may not feel that they should change in view of the fact that they were resolved in the lower court. I think the same thing applies here. There may be an effective appeal to the Appeals Council and at the same time conduct which may limit what scope the Appeals Council should choose to give. There is an argument made here that is what happened. There were arguments made to the jury on that question. I am not satisfied as a matter of law that any of that requires the setting aside of the jury verdict. I also might add parenthetically that I am not satisfied that there was no evidence to support the jury's finding with respect to the least-restrictive-means question as to whether they could or could not have suggested a three-story limitation earlier.

I think there is factual support for the jury's verdict. All of those claims are therefore rejected.

The only issue which is raised by the motion for a directed verdict which requires that the verdict be set aside is the applicability of the Noerr-Pennington doctrine to the facts of this case.

The Court starts, as it must, with the Noerr-Pennington case itself. Whatever interpretation or gloss the courts have put upon the Noerr-Pennington doctrine, obviously the Court must start with that case itself.

I think it is very plain from the Noerr case that conduct which is outside of or removed from the legislative halls can still be protected under Noerr-Pennington. I think the Noerr case makes that clear. Indeed, the facts of Noerr itself reflect conduct which was directed to the public at large. So the Court finds no basis for the argument made by the plaintiff in this case—and, indeed, the FTC, which filed an amicus curiae brief—that the concept should be limited to direct acts of petitioning the government or government agencies or officials. I think that interpretation is not supported by the facts of the Noerr case. That argument is therefore rejected.

It is also clear from the Noerr case and from the cases which have construed the case, California Transport and the lower-court cases—I can't cite them all, obviously, but they are referred to in the briefs and I don't think there is any need for me to refer to them here—that the Supreme Court has drawn a distinction between the kind of conduct which is permissible at the legislative level or with respect to legislation and that which might be permitted with respect to adjudicatory or judicial bodies and tribunals of that sort. There is a much freer rein of permissible conduct when we are dealing with attempts to influence the legislature than might be permissible if we were dealing with attempts to influence a judicial or adjudicatory tribunal. I think that strain runs through the California Transport case, the Second Circuit has adopted it in the Litton case, and Judge Carter adopted it in a lower court opinion, the name of which escapes me, but which was submitted and referred to in the brief. I think that is clear and can't be questioned.

So we are dealing here with a body which, as plaintiff concedes and defendant concedes, and have conceded throughout this litigation, once they adopt the safety standard, that

standard will almost inescapably be followed by the legislatures of the various states. While there is obviously an opportunity to change the mind of the legislature and while obviously there is an opportunity for the defendant and the plaintiff to lobby at that level, both sides seem to agree and have agreed from the inception of this litigation that the decision of the NFPA will be largely determinative of what the legislatures do.

I think there can't be any doubt, on the facts of this case, that certain things are crystal-clear. There can't be any question that the attempt on the part of Allied to influence the various state legislatures through the NFPA was a genuine attempt to influence legislative action. All of those cases which have found that Noerr-Pennington does not apply involve situations where it was clear that the defendant was not genuinely intending to influence legislative or official action but was merely indulging in a posture or a sham that was designed solely to effectuate their anticompetitive purpose. Here there is no question that defendant genuinely intended to influence legislative action through the NFPA. That was never in dispute. Moreover, the jury has found that Allied had a genuine concern for safety, and plaintiff has conceded that there was a factual basis for that concern.

Given all of those considerations, there is no way the Court can find, in the face of the jury's findings and in the face of the conceded facts of the case, that there was not an intent to influence legislative action through the NFPA in this case, which is protected by Noerr-Pennington. The Court has rejected the plaintiff's argument that merely because it was done one step removed from the legislative process it cannot be protected by Noerr-Pennington.

This leads us to the next step, which is the argument advanced that the kind of conduct which the defendant engaged in was so reprehensible and so outrageous as to require that it be found to be outside the protection of Noerr-Pennington itself. The Court rejects the argument that the conduct which is involved here—which is, for want of a better word, stacking the vote or getting out the vote, depending upon how you choose to characterize it, and the payment of expenses of the NFPA people, not in violation of any rules of

the NFPA—was somehow so outrageous as to be unprotected. The Court finds and has believed throughout this case that that kind of conduct is so much a part of the traditional democratic process at every level of our society, from the local club right through the Congress itself, that the Court cannot find that kind of conduct is so outrageous in and of itself so as to be unprotected.

The plaintiff argues, of course, that an exception to the antitrust laws should be narrowly construed and therefore this conduct should not fall outside those laws. They rely upon a series of cases which say that conduct otherwise illegal doesn't become protected because it has some incidental aspects of speech. As I have indicated during the course of the argument, the Court finds that argument to be circular in nature, because the ultimate question is: Is the conduct illegal? So those cases are not particularly helpful.

I think everyone concedes that Noerr-Pennington, while initially not a constitutionally based case, is predicated upon policy considerations which underlie the First Amendment and our own democratic institutions. And California Transport made it abundantly clear that there is a constitutional predicate for that decision. In short, the Supreme Court has made it clear that it would not interpret the antitrust laws so as to reach conduct which would otherwise be protected under our system. Given that circumstance, we are not really talking about an exception to the antitrust laws but the way in which we should rationally construe those statutes.

The argument was advanced here that Noerr-Pennington should not protect Allied's conduct—it was advanced, I might add, very belatedly in the case—because there are some specific statutes which would prohibit paying Congressional expenses. The Court does not find that argument persuasive or dispositive for the following reasons.

First of all, the rules of the NFPA do not prohibit the payment of expenses. Therefore, the fact that paying Congressional expenses is prohibited does not seem to have much relevance to the question.

Secondly, it is not entirely clear, given the parameters of the Noerr-Pennington doctrine itself, and the way the Supreme Court has construed it, that even if you paid a Congressman's expenses in violation of a Congressional statute itself, that would be unprotected conduct. I think the Noerr-Pennington cases protect deceptive conduct, even fraudulent conduct when addressed to a legislative body like the Congress or other legislative body. I think further that the NFPA, the way it was functioning in this case, was more akin to a legislature than a court, in that it was fixing prospective standards. Therefore, I am not satisfied, and certainly no Supreme Court case has ever held, that paying a Congressman's expenses in violation of federal law would be a violation of the antitrust laws, where, as here, that was done as part of a genuine effort to influence legislative action.

For those two reasons I reject the argument. I think it has very little relevance in the context of the NFPA. As Mr. Wright pointed out in his response, it has logic on its side but not reality, in the sense that nobody did anything illegal in terms of the NFPA rules, and the jury has so found. Indeed, the plaintiff paid the expenses of their people who attended meetings.

With respect to the sham exception, the Court finds absolutely no basis to apply the sham exception to the Noerr-Pennington doctrine. The Court is unaware of, nor has any case been directed to the Court's attention, of any court ever applying the sham exception to Noerr-Pennington in a case where, as here, there was a genuine attempt to influence a legislative body arising out of a genuine concern for safety, and, concededly, a factual basis for that concern.

A word should be said about the argument advanced by the Federal Trade Commission that, since actions of private standard making bodies excluding competitors' products from the market have been found to violate the antitrust laws, Noerr-Pennington should not apply in this case. The FTC asserts that the non-adoption of ENMT had other business consequences, such as an impact upon insurance, which flowed from its rejection, independent of the impact that it had with respect to the electrical codes of the various states. Reliance is placed on

the Radiant Burners case and the Hydrolevel case for the proposition that Noerr-Pennington should not be applied to the action of standard making bodies such as the NFPA.

In the first place, as has been noted, in Hydrolevel the Noerr-Pennington issue was not even raised. Moreover, in that case the plaintiff's damages flowed from a corrupt and surreptitious interpretation of a standard, which was engineered by an official of the standard making body (who was also a vice president of respondent's competitor) and circulated in the marketplace. Quite aside from the fact that the case involved facts more analogous to adjudicatory action, as to which Noerr-Pennington has a more restrictive application, the case did not, as this case does, involve any genuine effort to influence government action; nor did plaintiff's damages flow from any such governmental action. Here, of course, the opposite is true.

Radiant Burners is equally inapposite. In that case there was a concerted refusal to deal with a party whose product failed to meet the standard involved. Thus, concededly illegal conduct was involved, i.e., a group boycott, rather than a genuine attempt to influence legislative action to adopt or not adopt a standard.

Nor is this a case where the devising and filing of a tariff or a request for governmental approval was invoked as a cloak for clearly illegal anticompetitive conduct, such as in the Cantor and Litton cases. Moreover, as has been noted, plaintiff's alleged damages here arise solely from the fact that the rejection of ENMT by the NFPA led to its exclusion from the National Electrical Code, which is adopted by most of the states. This is evident from the complaint, see Complaint at paragraphs 13, 30-32, and from the position consistently maintained by plaintiff throughout this litigation. See, e.g., Trial Transcript, March 5, 1985, at 11-27, 34-37 (Opening Statement of Fredric Yerman, Counsel for Plaintiff—Liability Phase); Trial Transcript, April 2, 1985, at 2072, 2104-05 (Closing Statement of Fredric Yerman—Liability Phase); Trial Transcript, April 11, 1985, at 2301-02 (Opening Statement of Ira Sacks, Counsel for Plaintiff—Damages Phase); Trial Transcript, April 23, 1985, at 3220-24, 3246-50, 3256-57 (Closing

Statement of Ira Sacks—Damages Phase). The plaintiff has withdrawn any claim that the NFPA itself acted improperly or was a party to the alleged conspiracy, and, indeed, has dropped its claim against the NFPA, another circumstance which distinguishes this case from Hydrolevel.

In short, the case presents a situation where Allied, by the use of methods consistent with acceptable standards of political action, genuinely intended to influence the NFPA with respect to the National Electrical Code, and to thereby influence the various state and local legislative bodies which adopt the NEC, by advocating its genuine and adequately based safety concerns in the manner most likely to have an impact on these codes—by voting at the NFPA meeting. That conduct is of the type which Noerr-Pennington is clearly designed to protect, regardless of its anticompetitive purpose or intent. Plaintiff had the same opportunity to advocate its position before the NFPA in the same manner, and was clearly not excluded from that process in any way.

Under these circumstances, and where the alleged violation of the antitrust laws is simply that the defendant was able to produce more votes in its favor than plaintiff was able to muster in opposition, and where plaintiff's damages consist of a diminished share of the market flowing from the failure of ENMT to be included in the 1981 National Electrical Code, the Court is constrained to sustain the Noerr-Pennington defense.

With all due respect to Mr. Yerman, I find the logic and arguments of his senior partner more persuasive on that question. I reviewed the law review article, and I am convinced Professor Handler is quite correct in suggesting that the only thing the courts should look to in deciding whether Noerr-Pennington applies is whether or not there is a genuine intent to influence legislative conduct.

A good argument can be made for the fact that perhaps we should have granted summary judgment here. However, if I recall this case correctly, you were never able to agree upon a set of facts upon which the Court could frame that legal issue. But I think the whole point of Professor Handler's argument is that trials should be avoided in this situation unless there is some question as to whether there was a genuine intent to

influence legislative action. Out of an abundance of caution I had a trial. Being aware, as I am, of the Second Circuit's reluctance to affirm summary judgment, we had a trial. It may very well be that the Second Circuit will agree with Professor Handler that we didn't need one under the facts of this case. But we have had one. The Court tried the issue of whether or not the defendant had a genuine concern for safety. To make it absolutely clear, just in case there was some arguable position here that that might have constituted a sham, that they didn't really believe what they were saying, we have tried that issue and that issue has been resolved by the jury.

I am still not so sure the case was appropriate for summary judgment. It may have been if we accept Professor Handler's analysis. Nevertheless, the parameters of the sham exception to the doctrine are so unclear that I was not confident that the Second Circuit would affirm a grant of summary judgment on that issue, even assuming I was given an agreed statement of facts—which was not given, as I recall, although we made a lot of efforts in that direction.

I will respond at least to the suggestion made in Mr. Yerman's argument that somehow or other he retreated from or abandoned his position with respect to his claim that the damages in this case flowed from legislative action. I reviewed my charge and I reviewed the transcript. There is no basis for that argument. I find that argument untenable.

I think what happened at the trial—and I have refreshed my memory from the transcript—was that because of the question put to the jury with respect to least restrictive means, the portion of the charge referred to had to do with the fact that plaintiff would compute damages on the basis of the three-story limitation having been adopted in 1980. Later on in the charge, the Court pointed out to the jury that no damages were being claimed in terms of the damage phase of the trial from any conduct of public lobbying or lobbying of the legislatures. That had to do with mere computation of damages; it had nothing to do with the causation question.

The argument has been made by Mr. Yerman as to where we draw the line with respect to the applicability or nonapplicability of Noerr-Pennington. While no one has ever drawn that line

with precision, perhaps a good rule of thumb would be that you draw the line in any case where the plaintiffs claim their damages were caused by legislative conduct. There isn't any question in this case that the plaintiff throughout this litigation has contended that its damages flowed from legislative conduct in the sense that by not being adopted by the NFPA they were foreclosed from being included in the code and that is what caused their damage in the marketplace. I think the other cases relied upon by the plaintiff are legally and factually inapposite. The Court accepts the defendant's distinction of those cases because in each one of those cases the damage to the plaintiff flowed from some conduct of the defendant and not from the conduct of the legislature itself. Group boycotts, agreements not to deal—those were the factual contexts of those cases. We have been cited to no case in which damages flowed from legislative action where Noerr-Pennington has not been applied.

That is the law, and I think it requires the setting aside of the jury verdict because I find that Noerr-Pennington does apply. I find that the sham exception to Noerr-Pennington does not apply for the reasons I have given.

Therefore I will enter judgment accordingly.

That is the decision of the Court.

Supreme Court, U.S.
FILED
AUG 21 1987
JOSEPH F. SPANIOL, CLERK

No. 87-157

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALLIED TUBE & CONDUIT CORPORATION,

Petitioner,

—v.—

INDIAN HEAD, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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August 21, 1987

COUNTERSTATEMENT OF QUESTION PRESENTED

Should this Court invoke its certiorari jurisdiction to determine whether a unanimous Court of Appeals erred in refusing to extend the *Noerr-Pennington* doctrine to immunize from antitrust scrutiny under the Rule of Reason a conspiracy among competitors—motivated, at least in part, by a desire to maintain their hold on a concentrated market—to exclude a competing product from an industry code (and, hence, from the marketplace), where:

(a) The jury found that the conspiracy had "subvert[ed] the consensus standard making process" of the private trade association, thus eliminating the procompetitive benefit that justifies voluntary non-governmental standard making;

(b) The conspiracy was implemented by stacking the association's membership vote with "bodies" who were "instructed" "how to vote" and ordered to remain "nailed to [their] seats" until the agreed-upon exclusion was accomplished; and

(c) The product's exclusion from the code caused direct marketplace injury separate and apart from any injury caused by the code's adoption by organs of state and local government?

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STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

The parents of respondent (whose name was changed to TBG, Inc. after the filing of the complaint) are TBG North America Limited, TBG Holdings, N.V., Favorita Holding Company Limited, Tamara Corporation, and Thyssen-Bornemisza Continuity Trust. Respondent has no non-wholly-owned subsidiaries. Respondent's domestic affiliates are TBG North America Ltd., Agriquip Midwest, Inc., CCL Leasing Corp., Cap Inc., CLSI, Inc., C L Systems, Inc., Computer Library Services International Ltd., Continental Healthcare Systems, Inc., Ball-InCon Glass Packaging Corp., Greenland (Delaware) Inc., Information Handling Services, Inc., TBG Information Systems, Inc., Innotec Group Inc., International Berkefeld-Celle Filter Corp. of USA, Madera Glass Company, Moba USA Inc., Multi-Amp Corporation, Multi Amp Services Corporation, Mokveld Valves Inc., Predicasts International, Inc., Staalkat U.S.A. Inc., TBG Information Co. Inc., Vulcan Petroleum Inc., Vicon Credit Corporation, Vicon Farm Machinery, Inc., and Vicon Southeast, Inc. All of respondent's foreign affiliates are privately held companies.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-157

ALLIED TUBE & CONDUIT CORPORATION,

Petitioner,

—v.—

INDIAN HEAD, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Petition does not present any issue meriting review by this Court, since neither of the reasons advanced to justify granting certiorari arises from the record in this case.

(1) Contrary to petitioner's assertion, the decision of the Court of Appeals does not apply the Sherman Act to political activity with no direct marketplace impact. The conspiracy in question did *not* involve political activity; it entailed a deliberate—and successful—effort by competitors in a concentrated market to subvert the consensus standard making process of a *private* trade association in order to deny marketplace access to a competitive product. Moreover, the jury found that petitioner's conspiracy *did* have a direct impact on the marketplace—a finding expressly affirmed by the Court of Appeals, which denied rehearing, *inter alia*, on that precise issue.

(2) Nor does this record support petitioner's contention that the ruling below will chill any First Amendment right to engage

in good-faith debate in private code-making bodies. Far from good-faith debate, the conspiracy for which Allied was found liable involved anticompetitive *conduct* which, as the jury found, subverted the code-making process and unreasonably restrained trade.

The Court of Appeals, in reinstating a jury finding of an unreasonable restraint of trade violative of the Sherman Act's Rule of Reason, applied settled principles of law and declined to extend the *Noerr-Pennington* doctrine beyond its proper ambit. That eminently correct ruling does not conflict with any decision of this Court or of any court of appeals and does not warrant review by this Court.

STATEMENT OF THE CASE

The Petition correctly states that "[t]he facts giving rise to this case are well stated in the opinion of the Court of Appeals." (Petition ("Pet.") 2). The Second Circuit's decision, however, does not recite all of the pertinent facts material to consideration of the Counterstatement of the Question Presented. Accordingly, we set forth such facts below.

A. The Facts

1. The Parties and Their Products

Petitioner and respondent are manufacturers of products which compete head-on in the marketplace. Carlon, a division of respondent Indian Head, Inc., manufactures and sells various types of electrical conduit and fittings made of polyvinyl chloride ("PVC"). (A. 1554, 508, 515, 517).[1] Defendant Allied Tube and Conduit Corporation ("Allied") is the largest producer of electrical metallic tubing ("EMT")—*i.e.*, steel conduit—in the United States. (A. 1009).

Electrical conduit is a hollow tube that carries insulated wires which transmit electrical current. (A. 906-07). The

1 Citations to the record conform to those in the Petition.

Carlon product involved in this case—electrical nonmetallic tubing ("ENMT")—has a number of significant competitive advantages over steel conduit due to its pliability, its lower installed cost and its lower susceptibility to short circuiting. (A. 518-20, 531-34, 1503 B-C, 1554-55, 1896).[2] In 1980, when Carlon began offering ENMT as a substitute for EMT, it confronted a stable market dominated by five EMT producers, the largest of which was Allied, with a market share of 35% to 40%. (A. 520, 535-36, 990, 1009-10, 1555, 1647, 1669A).

2. The NFPA and the National Electrical Code

The National Fire Protection Association ("NFPA") is a "private, non-governmental . . . voluntary membership organization" barred by law from "attempt[ing] to influence legislation."[3] One of its principal activities is the promulgation, through a process called "consensus standard making," of product standards and codes related to fire protection. (A. 496, 595, 1170-71). As the term implies, NFPA members attempt to reach a consensus, objectively arrived at on the merits, with respect to standards that are then offered to the public. (A. 709, 718, 1170). Although the NFPA encourages new membership "so that it can represent as broad a spectrum as possible," no single interest is supposed to become so large that it "can predominate and make the standard the creature of that interest." (A. 595, 707-10, 756-58, 1193). While there are no prerequisites for voting at the annual meetings at which the standards are adopted, there is an "inherent assumption" that the members voting at the meeting "know what they are

2 The Petition's assertion (Pet. 9) that the parties agreed that "the exclusion of PVC conduit from the 1981 NEC was supported by objective scientific evidence" is misleading. It was stipulated below that there is a substantial body of opinion, including views held by those in both the plastic and steel industries, disagreeing on the relative safety of plastic and steel conduit. As the district court instructed the jury, "[a]ll the jury should assume is that the parties do not dispute that people disagree on the issue and there is an objective basis for a concern for safety." (A. 69).

3 A. 1555; *see* 26 U.S.C. §§ 170(c)(2)(D), 501(c)(3).

doing" based on full disclosure of all relevant information. (A. 711, 1139-40, 1340, 1556).

The NFPA code at issue here is the National Electrical Code ("NEC") which sets standards for electrical systems, including electrical conduit. (A. 496-97, 1556). The NFPA publishes the NEC every third year following a multistep, several-year-long process, ending with a vote by the full membership at the annual meeting. (A. 544-48, 554, 905-06, 1556, 1848-55, 1897). In 1980, a simple majority vote of those members present at the meeting was sufficient to approve or defeat a proposal. (A. 1849).

Following NFPA adoption, in addition to serving as the basis for private decisions that directly affect market competition,[4] the NEC is adopted, in whole, in part or with amendments, by many governmental entities, including state legislatures and administrative boards and county, city and other local governmental bodies. (A. 496-97, 690, 900-01, 1557; *see generally* A. 137-362, 364-453). Because of the NEC's reputation as the product of consensus standard making and the large number of governmental bodies involved, inclusion in the NEC is a practical prerequisite to any product's inclusion in governmental codes. (*See, e.g.*, A. 365, 690, 718, 458-59).

Adoption by organs of government, however, is neither automatic nor routine. (A. 432-53, 903-04). There is significant lobbying at the legislative level. Indeed, approximately one-half of the states that adopt electrical codes do not adopt the NEC verbatim. (A. 433-34). As Allied conceded, the NEC "does not itself have the force of law" and "is not itself legally operative." (A. 1556-57).

3. The Admitted Conspiracy to Exclude ENMT from the Market

Just before the case was submitted to the jury, Allied conceded that it had conspired with, *inter alia*, Republic Steel Corporation ("Republic"), Wheatland Tube Company ("Wheatland"), other EMT competitors and Allied's indepen-

4 *See* pages 10-11, *infra*.

dent sales agents to exclude ENMT from the 1981 NEC by stacking the May, 1980 NFPA meeting. (A. 1397, 18-22). Allied also conceded that it "had a pecuniary or commercial interest in seeing to it that the product was not approved." (A. 77-78). The evidence that compelled these concessions was overwhelming.

a. The Conspiracy's Formation

On September 18, 1978, Carlon submitted to the NFPA a proposal (denominated "Article 331") to include ENMT in the NEC. (A. 1560, 563-70, 1756-59). Following approval by the appropriate technical committees, Article 331 was submitted to the NFPA membership for consideration at the annual meeting to be held in May, 1980 in Boston. (A. 1894-95).

When Allied and the other EMT producers became aware of Article 331, they immediately recognized, as one conspirator later wrote, that it was the "first major battleground for the attack on steel markets by segments of the plastic industry during the 80's." (A. 1634). Fully cognizant of the "severe competitive threat" posed by ENMT (A. 1206), the conspirators agreed to exclude it from the market by rigging the vote on Article 331 at the May, 1980 meeting.[5] Following committee approval of Article 331, an "urgent" meeting of the Steel Rigid Conduit and Electrical Section of the National Electrical Manufacturers Association (the "NEMA Steel Section") was held to discuss the matter. (A. 1641, 1701, 970-71, 1558-59). At that meeting (and another held shortly thereafter), representatives of Allied and its coconspirators agreed that each Steel Section member company would "be asked to provide for the attendance of as many NFPA voting members as possible" at the upcoming meeting, noting that under the NFPA's then-current rules persons only had to be members for thirty days to be

5 A. 991, 1205-06, 1351, 1355, 1511-13, 1563. After a study "in detail" of the adverse effect that Article 331's adoption would have on Allied's sales, Allied's Board of Directors was told that the company would lose 40% of its EMT volume by 1984—a loss which in 1984 alone would amount to $20 million. (A. 992-99, 1002-09, 1650).

eligible to vote. (A. 1561-62, 1703, 1094, 1207-09, 1562-63).[6] For its part, Allied pledged to bring at least 100 people to vote against Article 331. (A. 1708-13, 974, 1563).

The conspirators left nothing to chance. A formal "battle plan" was prepared, calling for, among other things, each participant to "go[ ] all out to have bodies on the floor to vote" at the May meeting and "to contact all steel companies . . . urging them to add new members and to be in Boston to vote." (A. 1708-13, 1634, 1725-29, 1832-34, 1730, 974-77, 1563). As the "battle plan" put it, "[t]he question to ask is: What is it worth to save our conduit business . . . ?" (A. 1708-13).

Allied immediately took steps to recruit and get its "troops" in line. (A. 1029, 1212-13). Beginning in February, 1980, Allied's national sales manager began contacting its independent sales agents—separate companies unaffiliated with Allied—as an additional source for new NFPA votes. (A. 1018-19, 1938, 1515-17, 1562). Allied discussed with them the adverse economic effect that approval of Article 331 would have and assigned them targeted numbers of new members to recruit. (A. 1012-19).

All told, Allied and its coconspirators brought at least 230 voters to the meeting. (A. 1231). Among the 155 persons that Allied alone brought to the annual meeting to vote against Article 331 were its employees, sales agents, the agents' employees, company executives, employees of two of Allied's divisions—neither of which sold electrical products and one of whose businesses was "lawn furniture and things like that"—and the wife of the national sales director. (A. 1566, 1032-34). For the express purpose of "gathering [their] votes," Allied paid all of these individuals' expenses, totalling over $100,000 for membership fees, travel expenses and other costs. (A. 987-88, 1020-21, 1214-15, 1566-67, 1908-14).

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6 It was also agreed that because "[p]roblems regarding restraint of trade are a very real concern," there would not be "direct[ ]" discussion of these problems; instead, future discussions regarding ENMT "must be" limited to the alleged "safety aspects." (A. 1703, 972-73, 1095).

b. The May, 1980 Meeting—The Conspiracy Succeeds

Implementation of the conspiracy to exclude ENMT from the market commenced with a cocktail party in Boston on the night of May 18th. "All Allied salesmen, representatives and personnel" were informed that attendance was "imperative." (A. 1585, 1025-27). Allied's self-described "troops" were given "[c]omplete instructions" on what to do at the meeting, including (1) where to sit, based on a detailed seating chart broken down by "groups," (2) the appointment of "group leaders" responsible for "keep[ing] order among the troops," (3) that "[o]nce the NEC ratification starts" the "troops" were "expected to stay nailed to [their] seats," and (4) that box lunches would be provided "in case the session carries over into the evening—*NO ONE* leaves . . . until after this evening session." (A. 1587, 1593, 1028-36, 1566). The "troops" were explicitly told that "[y]our Group Leader *will instruct you* how the discussion is progressing and *how to vote*." (A. 1593 (emphasis added), A. 1035-37). Representatives of Allied, Wheatland, Republic and another EMT competitor met "to reach a consensus . . . as to the procedures that were going to be followed at the meeting"; and Allied distributed walkie-talkies to the other steel companies to assure that the "troops" voted as instructed.[7]

In accordance with their instructions, the 155 Allied members—sitting in their predesignated "groups"—"stay[ed] nailed to their seats" during the annual meeting. (A. 1221, 1566). Paying "no attention" to the substance of the proceedings, the "troops" had no idea as to the merits of what was at issue. (A. 1106-09, 1177, 1815-21). Thus, even though ENMT's claimed safety risk was the purported reason for Allied's opposition, very few of its voters had any of the technical documentation necessary to follow the proceedings; *nor did a single one of them speak in opposition to Article 331 during the course of the meeting*. (A. 1106-08, 1310-11; *compare* A.

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7 A. 1086-92, 1219-21; *see also* A. 1215-18, 1518-19, 1677, Plaintiff's Trial Exhibit ("PX") 412, A. 1567.

1352 *with* A. 606-18, 1761-80). As one stated when questioned at the meeting as to why, as he put it, he was "instructed to vote to return [Article 331] to committee," "I was just told to come to the meeting and be present when they voted . . . ." (A. 1111-12).

Although Allied's voters paid no attention to the substance of the proceedings, they were careful to follow the conspirators' instructions communicated to them via their "group leaders" by walkie-talkies and "signals"—"thumbs up, yes, thumbs down, no." (A. 1037-40, 1306-09, 1566-67). Two votes were taken on Allied's coconspirator's motion to return Article 331 to committee. (A. 606, 1041-42). The first, a voice vote, was inconclusive. (A. 618, 1774). The second, a standing vote, was taken amidst "a lot of confusion and congestion." (A. 619-23, 1041-43). When the dust settled, the Chair ruled that Article 331 had been defeated by only four votes—394 to 390. (A. 634, 1567). Despite requests by Carlon and others, no recount was permitted under the NFPA's rules, since no one who voted against Article 331 requested one. (A. 627-34, 1775-80). Finally, "[t]o insure that there would not be [any] change" in the outcome, Allied's "troops" were kept in their seats until 2:00 a.m. when the final vote on the complete NEC was taken. (A. 1228-30, 1317-18). Absent the 230 "troops" brought by Allied and its coconspirators to do their bidding (A. 1231), Article 331 would have been overwhelmingly approved.

The subversion of the NFPA's consensus standard making process was the subject of criticism during the meeting itself. (A. 1771-73, 1110-11, 1127-28, 1142-45). After the meeting, there was a "negative reaction" to the conspirators' conduct, including editorials in trade magazines castigating the "mob rule" that had "abuse[d]" the NFPA and turned its "codemaking process . . . into a battleground for establishing commercial preference for competing product types." (A. 1332, 1934-37, 1224-27, 1304). Allied, however, was unrepentant. The only "lesson" that its Director of Public Safety Issues drew from this hostile reaction was that the next time Allied

sought to rig a vote, it should "not [be] so obvious." (A. 1330-31, 1606-09).

Following the defeat of Article 331, Carlon (and the National Association of Home Builders) appealed on the ground that the vote was not based on the "technical merit[s]," was "not representative of the membership of the association and cannot be construed as [a] consensus." (A. 1905-06, 636-37, 642, 1567). The NFPA Board of Directors, eschewing any investigation of the substance of these allegations and viewing the scope of its review as limited to the question of whether the Association's rules had been followed, found that, while the rules had been "circumvented," they had not been violated, and denied the appeal, returning Article 331 to committee "for further study."[8]

4. The Sanders Committee Report

In the wake of the May, 1980 meeting, the NFPA Board of Directors was "concerned . . . very much" about the "circumvent[ion]" of the Association's rules. (A. 1163, 1171-72, 1194-98). As Jack Sanders, its Chairman, testified, the conspirators' "battle plan" was inconsistent with the spirit and intent of the NFPA's consensus standard making procedures. (A. 1173). For it was wholly contrary to the NFPA's goals "for a company that would like to keep a competitive product off the market to register as many of its employees as possible . . . so that they can vote against that competitive product." (A. 1193-94; *see* A. 674-75, 1571).

In order to "combat any potential" for the repeat of "that kind of activity," the NFPA Board appointed a committee headed by Mr. Sanders to review the "stacking" of the 1980 meeting and to take steps "to maintain the integrity of the [Association's] standards." (A. 1163, 1171-72, 1571). After a "review in-depth [of] the entire procedural activities under which we develop our codes and standards," the committee recommended, and the Board adopted, new regulations. (A.

8 A. 638-46, 1164-69, 1177-79, 1181-84, 1186-87, 1835-37, 1568.

1169-70, 1174-75, 1856-75, 1571). These included increasing to 180 days from 30 the minimum time that a person must be an NFPA–member in order to vote at the annual meeting. (A. 1197-98). As Mr. Sanders testified, the specific purpose of this change was "to avoid block voting by special interest groups in the future." (A. 1174, 1197).[9]

5. The Conspiracy's Market Effect

The successful conspiracy to exclude Article 331 from the 1981 NEC had the direct effect of excluding Carlon's product from the marketplace. In addition to the exclusionary impact in those jurisdictions which adopted the NEC as their electrical code and precluded the lawful use of Carlon's product altogether, Carlon was injured by the "stigma"—and Allied's marketing of that stigma—resulting from the wrongful exclusion of ENMT from the NEC even in those jurisdictions where Carlon's innovative and less expensive product could be lawfully used, *i.e.*, jurisdictions which (1) had no electrical code; (2) had adopted the 1981 NEC, but modified it to permit ENMT's use; or (3) later adopted the 1984 NEC, which itself permitted the use of ENMT. This stigmatization of ENMT was successful because of the NEC's reputation as a product of consensus standard making. Thus, it was undisputed that "[t]hird party certifiers of electrical equipment such as Underwriters Laboratories will normally not list and label a product without NEC approval." (A. 1557-58; *see* A. 694-95, 704, 922-23, 1706, 1989). Similarly, many electrical inspectors, contractors and distributors will not use a product absent NEC approval and the UL label, and underwriters will refuse to insure structures that are not built in conformity with the NEC. (A. 556-57, 693-94, 700-01, 1558). And Allied fully capitalized on Carlon's predicament, doing "everything it

9 With the new rules in place, and without opposition by Allied, Article 331 was finally included in the 1984 NEC, but with the limitation that ENMT could be used only in structures up to three stories in height. (A. 672, 674, 1353, 1381, PX-595 pp. 201-03). At its May, 1986 meeting, the NFPA approved a new Article 331 deleting the three-story limitation from the 1987 NEC. Allied's appeals from that approval were denied.

could to make sure that as many people as possible found out about the defeat of Article 331," including advertisements and distribution of documents to "people in the industry" informing them of the defeat.[10]

In short, ENMT's exclusion from the 1981 NEC—the "primary code for the electrical industry in the United States"—effectively excluded it from the marketplace. (A. 1556; *see* A. 696, 704, 800). This adverse market effect flowed directly from the consensus standard making process itself and the public's reliance on the NEC as the purported product of unbiased industry consensus. (*See* A. 719, 916-17). The 1981 NEC gives no hint that it was the product of subversion or that it was adopted on any grounds other than the merits (*see* A. 1917-26); and, needless to say, neither Allied nor its coconspirators informed the public that the Code resulted from a stacked meeting at which the process had been subverted. To the contrary, as noted above, Allied fully exploited the "stigma" that its own conduct brought about throughout the marketplace.[11]

B. The Proceedings Below

1. The Trial

After extensive pretrial proceedings, a bifurcated trial commenced on March 4, 1985 before Hon. John E. Sprizzo and a jury on Carlon's claim that Allied and its coconspirators had "combined and conspired to prevent competition from nonmetallic tubing by excluding it from the 1981 NEC" by "subvert[ing the] . . . NFPA's consensual standards, rules and procedures." (A. 18-22). After four days of deliberation, the jury, in response to special questions, rendered its verdict, finding, *inter alia*, that "Allied's conduct in opposing Article

10 Trial Transcript pp. 2979-89; *see* A. 1454-55.

11 As the above discussion demonstrates, Allied is plainly wrong when it asserts that its subversion "caused Carlon *no* harm," that Carlon "proved damages *only* for injury attributable to legislative enactment of the NEC," and that "the record contains *no* evidence supporting the 'stigma' theory or indicating that Allied 'marketed' the stigma." (Pet. 19-20) (emphasis added).

331 adversely impact[ed] competition," "constitute[d] an unreasonable restraint of trade in violation of the antitrust laws," and was "a substantial or material factor in excluding Article 331 from the 1981 NEC."[12] Among its other findings, the jury concluded that "[r]egardless of whether Allied's conduct violated any of the rules or regulations of the NFPA"—which the jury found it did not—"Allied's conduct subvert[ed] the consensus standard making process of the NFPA" and did not "constitute the least restrictive means of effectively expressing Allied's opposition to the use of ENMT in the marketplace."[13]

At the conclusion of the damages phase of the trial, the court instructed the jury that any award of damages must be limited to those incurred by Carlon as a result of the actions of Allied and its coconspirators "at the May 1980 meeting and [their] marketing of that defeat [of Article 331] in the marketplace."[14] The court went on to instruct the jury that Carlon did

12 A. 474M, 474N, 474K. Under the court's Rule-of-Reason charge, the jury was instructed to consider whether the NFPA's rules were "reasonably designed to secure a consensus with respect to safety of products as they were accepted or not accepted in the electrical code" and whether "the procedures that were followed at the floor meeting in May of 1980 [were] consistent with the spirit . . . of the rules of the NFPA." (A. 1446-47). In finding that Allied's conduct unreasonably restrained trade under that charge, the jury implicitly answered these questions in the negative—findings buttressed by the specific determination that Allied's conduct "subvert[ed] the consensus standard making process of the NFPA." (A. 474G).

13 A. 474F, 474G, 474L. The parties agreed upon the wording of the questions put to the jury. Contrary to petitioner's assertion that the jury did not understand the subversion question (*see, e.g.*, Pet. 18), Allied did not challenge at trial or in its post-trial motion the wording of any of the questions or of the district court's charge relating to subversion.

14 A. 118. Judge Sprizzo charged the jury that:

> [T]he plaintiff's argument is what happened in May 1980 has created a certain stigma on the product which has carried through and that the defendants have attempted to market that stigma in the years which have ensued so that the extent of the damages which it now suffered

not claim, and the jury could not award, damages based on any lobbying activities of Allied. (A. 118). Based upon these instructions, the jury found that "as a proximate result of Allied's unreasonable restraint of trade in violation of the antitrust laws," Carlon lost $3.8 million in profits.[15]

2. The District Court's Oral Decision

In an oral ruling from the bench, Judge Sprizzo held that the *Noerr-Pennington* doctrine "require[d]" that the jury's verdict be set aside. (App. 23a-24a, 25a). The underlying rationale of the court's decision is not entirely clear. On the one hand, the district court suggested that the NFPA functions as a quasi-legislature and that, as a result, Allied's conduct in causing the Association to keep Article 331 out of the NEC constituted petitioning for legislation. (*See, e.g.*, App. 25a-26a, A. 467). On the other hand, the court also expressed a view that once the NEC is adopted by the NFPA it "will almost inescapably be

> are a direct result of what happened in 1980, and that is the plaintiff's claim. *The plaintiff claims [its] damages do result from what happened in May 1980 and not from any conduct of the defendants that they were engaged in other than the marketing of that defeat in 1980 in the years that follow. That's the plaintiff's claim.* (A. 117) (emphasis added).

15 A. 1494, 4740. In light of, *inter alia*, the court's charge, Carlon's and Allied's counsel's opening and closing arguments at the damages phase of the trial, and Allied's stipulation of facts as incorporated in the final *pre*-trial order (A. 117-18, 1479-80, 1485-88, 2627-36, 2678; *see* page 10, *supra*), it is remarkable that Allied could now claim that "Judge Sprizzo did *not* submit the stigma theory to the jury" and that "from complaint through trial openings, summation and verdict" the "*only* theory on which Carlon litigated the case" was that governmental adoption of the subverted NEC "excluded its ENMT product from the market." (Pet. 19, 20) (emphasis in original). If, as Allied argues, Carlon was injured exclusively by legislative enactment of the NEC (Pet. 19), *i.e.*, only in those jurisdictions adopting the NEC, there would have been no need for Allied to have "marketed" the defeat of Article 331; for exclusion from the NEC would *ipso facto* have resulted in exclusion of Carlon's product from the market *in those jurisdictions*. Allied's "marketing efforts" served to put the nail in the coffin in the *remaining* jurisdictions. (*See* pages 10-11, *supra*).

followed by the legislatures of the various states" and, as a result, the entire NFPA standard setting process—including the complained-of concerted conduct—was an attempt by Allied and its coconspirators to persuade state legislatures to adopt their anti-ENMT position. (App. 25a-26a).

3. The Court of Appeals' Decision

On April 22, 1987, the Court of Appeals for the Second Circuit (in an opinion by Senior Circuit Judge Lumbard, joined by Circuit Judges Kearse and Pratt) unanimously reversed, rejecting both of Allied's arguments for antitrust exemption.[16] At the outset, "declin[ing] Allied's invitation to extend *Noerr-Pennington* immunity to lobbying activities directed toward a 'quasi-legislative body' such as the NFPA," the Court recognized that none of the concerns upon which *Noerr*'s holding was based applied to private organizations. (App. 12a). Unlike a government, a private organization is unelected, unaccountable and " 'presumed to be acting primarily on . . . its own behalf.' " (App. 13a-14a, quoting *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 45 (1985)). Thus, "[n]o . . . safeguards [similar to those applicable to governments] exist to prevent a private organization from adopting policies contrary to the interests of the general public—in the instant case, establishing an anticompetitive restraint of trade." (App. 14a). Echoing this Court's decision in *American Society of Mechanical Engineers, Inc.* v. *Hydrolevel, Inc.*, 456 U.S. 556, 570 (1982), Judge Lumbard emphasized that the concern that private standard setting organizations "might operate contrary to the public interest becomes particularly acute in view of their importance within the economy." (App. 15a). Agreeing with the Fifth Circuit's analysis in *Feminist Women's Health Center, Inc.* v. *Mohammad*, 586 F.2d 530 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979), the Court concluded that the fact that state and local governments may—but are

16 The Court's decision is officially reported at 817 F.2d 938.

not required to—adopt the NEC "does not transform the NFPA into a governmental organ." (App. 16a).

Turning to Allied's second argument—that its subversion of the standard making process was protected as an "indirect petition"—the Court held that "Allied's behavior, which itself caused independent antitrust injury to Carlon, should not be excused merely because its actions also indirectly influenced state and local governments." (App. 17a). Again agreeing with the view of the Fifth Circuit,[17] the Court differentiated between the "submission of a group's recommendations to the government"—which *is* protected—and "the antecedent conduct which generated those recommendations"—which is *not* protected. (App. 17a). Nor was the Court "swayed by Allied's contention that . . . the only effective method of influencing . . . governments is through the NEC amendment process." (App. 18a). As Allied conceded, it had the opportunity to lobby the governments and, indeed, "over half the states and cities [that Allied] polled either amended the NEC before adopting it or refused to adopt it at all." (App. 18a-19a). The Court of Appeals likewise rejected Allied's argument that denial of antitrust immunity "would be inconsistent" with this Court's ruling in *Noerr* since, unlike the railroads' publicity campaign in that case, Allied's subversion did not "constitute 'political activity' conducted within the 'political arena.' " (App. 19a). "Simply put, Allied's conduct did not constitute petitioning of the government within the meaning of *Noerr-Pennington*; rather, its conduct was a subversion of the legitimate purposes of the NFPA." (App. 17a).[18]

17 *See* Feminist Women's Health Center v. Mohammad, *supra*, 586 F.2d at 545; United States v. Southern Motor Carriers Rate Conference, Inc., 702 F.2d 532, 542 (5th Cir. 1983), *reaff'g en banc* 672 F.2d 469 (5th Cir. 1982), *rev'd on other grounds*, 471 U.S. 48 (1985).

18 The Court of Appeals also rejected Allied's contention that "its conduct did not constitute an unreasonable restraint of trade." (App. 19a-20a). First, the Court "refuse[d] to permit [Allied] to use its literal compliance with [the NFPA's] rules as a shield to protect [its conspiracy] from

Following the panel's decision, Allied petitioned the Second Circuit for rehearing and rehearing *en banc*, arguing, *inter alia*, that the Court of Appeals had misconceived the trial record in concluding that Carlon's damage award was based on injury stemming from the direct marketplace effect of Allied's conduct. (*See* Petition for Rehearing at 7-13). On June 11, 1987, that petition was denied, no judge who heard the appeal and no active judge of the Court "ha[ving] requested that a vote be taken thereon."

REASONS FOR DENYING THE WRIT

The Petition's effort to implicate the doctrine of *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and its progeny, and thereby raise issues in this case worthy of review by this Court, proceeds on two critical but manifestly false assumptions: (1) that the case involves "political activity that has no direct market place impact"; and (2) that application of the Sherman Act to Allied's conduct "will chill good-faith debate in private code-making bodies . . . ." (Pet. 12). Since both assumptions are demonstrably incorrect, the Petition collapses like a house of cards.

This case does not concern political activity of the sort exempted from antitrust scrutiny by the *Noerr-Pennington* doctrine. Nor will the imposition of Sherman Act liability for the blatantly anticompetitive conspiracy proved—indeed, admitted—here chill any good-faith debate in private code-making bodies.

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antitrust liability." (App. 21a). Nor did the Court "find any merit" in Allied's reliance on the existence of objective scientific evidence to support the exclusion of Carlon's product from the NEC since the " 'objective validity' of a restraint has never been a defense to an antitrust charge." (App. 22a).

I. This Case Does Not Involve "Political Activity" with No Direct Market Impact.

In *Noerr*, this Court held that the antitrust laws do not apply to "activities compris[ing] mere solicitation of governmental action with respect to the passage and enforcement of laws." 365 U.S. at 138.[19] Put another way, the Sherman Act does not prohibit conduct which seeks to induce the government to take action in restraint of trade, since any other rule would impinge on constitutionally protected rights of free speech and petition. But when private conduct itself unreasonably restrains trade by directly impacting the marketplace, *Noerr* and the policies it reflects are not pertinent and the antitrust laws apply with full vigor.

Petitioner, apparently aware of this limitation on *Noerr*'s scope, strives to bring this case within the doctrine by asserting that Allied's conduct was solely political and had no direct marketplace impact. (Pet. 12). The record, however, is clear that the conspiracy to exclude Carlon's product had a direct market impact separate and apart from any action by organs of state or local government with respect to the adoption of the NEC. (*See* pages 10-11, *supra*).

As the Court of Appeals specifically noted (App. 17a), "Allied's behavior . . . itself caused independent antitrust injury to Carlon . . . ," a conclusion that follows inexorably from the jury's finding that Carlon suffered compensable

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19 Petitioner takes issue with the Court of Appeals' treatment of the *Noerr* doctrine as an "exemption" from the antitrust laws to be construed narrowly. (Pet. 12). Petitioner's semantic quibbling takes it nowhere. As Justice Brennan noted in *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 399 (1978), the doctrine is one of "implied exclusion from coverage of the antitrust laws" and is subject to a "presumption against repeal by implication." Indeed, as the Court there pointed out, the doctrine has been "unavailing to prevent antitrust enforcement which, though implicating [the] fundamental policies [underlying the doctrine,] was not thought severely to impinge upon them." *Id.* at 400. In this case, the policies underlying the *Noerr* doctrine are not implicated at all because Allied's conspiracy in unreasonable restraint of trade in no way entailed the solicitation of governmental action.

injury arising from the stigma of not obtaining NFPA approval of its product and Allied's marketing of that stigma. (App. 9a n.3).[20] Unable to square its *Noerr* theory with that critical fact, petitioner would have this Court review the Court of Appeals' decision with respect to the adequacy of the trial record to support the jury's finding.[21] That finding knocks the prop out from under the Petition's effort to raise a significant *Noerr* issue here. For, on Allied's own statement of the issue it seeks to present, its anticompetitive conduct *did* have a "direct marketplace impact," and that alone disposes of the *Noerr* claim.

Nor did the conspiracy in this case comprise "mere solicitation of governmental action" within the meaning of *Noerr*. Allied's conspiracy was a classic combination in unreasonable restraint of trade, not an effort to persuade government to act. The NFPA—a concededly "private, non-governmental . . . organization" (A. 1555)—is not an organ of government; and subverting its consensus standard making process was not governmental petitioning.

In marked contrast to the concerted publicity campaign immunized in *Noerr*, Allied's conspiracy to exclude Carlon's product from the marketplace by excluding it from the NEC was a restraint of trade squarely within antitrust's mainstream. In *Noerr*'s language, it was "characterized by an express . . . agreement . . . that the participants will jointly . . . help one another to take away the trade freedom of others . . . ." 365 U.S. at 136. As this Court noted in *American Society of*

20 In *Noerr*, by contrast, the private truckers' only injury was concededly caused by the Governor's veto of legislation. 365 U.S. at 130.

21 Thus, petitioner argues that "Allied's vote packing and other activity at the NFPA meeting . . . caused Carlon no harm. Carlon suffered injury only when state and local legislatures enacted the NEC without Article 331." (Pet. 19). The record is directly to the contrary (*see* pages 10-11, *supra*), as the Court of Appeals held in reversing the grant of judgment n.o.v. Indeed, Allied focused its petition for rehearing on this very issue—a petition the Court unanimously rejected. In any event, this Court "do[es] not grant certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925).

Mechanical Engineers v. *Hydrolevel Corp.*, 456 U.S. 556, 571 (1982), "a standard setting organization like ASME can be rife with opportunities for anticompetitive activity . . . ." Allied and its cohorts seized that opportunity to hamper their competitor's access to the marketplace. In *Hydrolevel*'s words, Allied "successfully used its position within [the NFPA] in an effort to thwart [Carlon's] competitive challenge." *Id.* at 562. It is inconceivable that Congress intended to shield such conduct from Sherman Act scrutiny solely because some state legislatures and municipal bodies decided to adopt the Code that Allied utilized to further its anticompetitive scheme.

The Court of Appeals' refusal to extend *Noerr* immunity to lobbying activities directed towards a so-called "quasi-legislative" body properly maintained the doctrine's limited applicability to true governmental petitioning. (*See* App. 12a). The NFPA, while possessing very substantial power to affect the economic well-being of companies attempting to market products covered by the codes it adopts, is not an organ of government and has not been delegated any governmental authority.[22] As this Court has noted, "[w]e may presume, absent a showing to the contrary, that [a governmental organ] acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf." *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 45 (1985). For that reason, concerted efforts to persuade private groups to take anticompetitive action do not constitute the type of political petitioning the *Noerr* doctrine excludes from antitrust scrutiny. *See, e.g.*, *Feminist Women's Health Center, Inc.*, v. *Mohammad*, 586 F.2d 530, 542 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979) (communications within hospital staff "as a matter of law unprotected [under *Noerr*]"; *United States* v. *Johns-Manville Corp.*, 259 F. Supp. 440, 452-54 (E.D. Pa.

22 Significantly, the NFPA itself has eschewed any such role by stating that it "is *not* an administrative arm of any state or local jurisdiction . . . ." (Decision of NFPA Board of Directors on Appeal of Allied Tube and Conduit Corp., Sept. 26, 1986, p. 8) (emphasis in original).

1966) (communications before private standard setting association not *Noerr* protected).[23]

As for the Petition's assertion that Allied's conduct here was nothing more than an effort to bring "indirect influence" to bear on state legislatures (Pet. 13), it is both factually and legally incorrect. As a matter of fact, petitioner's statement that "lobbying within the code-making body is the *only* effective way to influence ensuing legislation" (Pet. 11; emphasis added),[24] is contrary to the record, as both the district court[25]

23 *See also* MCI Commun. Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1159-60 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); United States v. Southern Motor Carriers Rate Conference, 702 F.2d 532, 542 (5th Cir. 1983), *reaff'g en banc* 672 F.2d 469, 477 (5th Cir. 1982), *rev'd on other grounds*, 471 U.S. 48 (1985); Mid-Texas Commun. Sys., Inc. v. American Tel. & Tel. Co., 615 F.2d 1372, 1382 (5th Cir.), *cert. denied*, 449 U.S. 912 (1980); Litton Sys. Inc. v. American Tel. & Tel. Co., 700 F.2d 785, 807 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984); Ashley Meadows Farm, Inc. v. American Horse Shows Ass'n, 1983-2 Trade Cas. (CCH) ¶ 65,653, at 69,352-53 (S.D.N.Y. 1983).

The three district court decisions the petitioner cites as reaching a conclusion opposite to that of the Court of Appeals here all treated the standard setting organization as the equivalent of an organ of government for *Noerr* purposes. Sessions Tank Lines, Inc. v. Joor Mfg., Inc., 1986-1 Trade Cas. (CCH) ¶ 66,989 (C.D. Cal. 1986), *appeal pending*, No. 86-6208 (9th Cir.); Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit Corp., 573 F. Supp. 833 (N.D. Ill. 1983); Rush-Hampton Indus. v. Home Ventilating Inst., 419 F. Supp. 19 (M.D. Fla. 1976) (Pet. 15). This view misconstrues the essence of the right to petition underlying *Noerr*, as the Court of Appeals properly explained. (App. 15a-17a). In any event, those decisions are plainly distinguishable and in no way conflict with the decision below. (*See* page 23 n.30, *infra*).

24 Petitioner makes the same incorrect assertion when it states that "*the* effective route to Allied's goal was via the NFPA." (Pet. 13) (emphasis added).

25 "[T]here is obviously an opportunity to change the mind of the legislature and . . . there is an opportunity for the defendant and the plaintiff to lobby at that level . . . ." (App. 26a). And the record is plain that Allied availed itself of that opportunity. (A. 1204, 1322-29).

and the Court of Appeals[26] expressly noted. And, as a matter of law, to suggest that concerted subversion of the NFPA's standard making process was merely a political effort to persuade state and local governments to adopt the Code would mean that the Sherman Act could never be applied to standard setting conspiracies, so long as some governmental organ ultimately adopted the agreed-upon standards.[27]

It is most significant that, in finding that Allied's conduct unreasonably restrained trade, the jury—pursuant to the district court's instruction—found that the conspiracy's anticompetitive effect outweighed whatever procompetitive justification the standard setting process may have had. To immunize conduct that the fact finder determined had a net anticompetitive impact in the marketplace solely because the code produced by the conspiracy later was adopted by some—though

26 "Nor are we swayed by Allied's contention that, because of the heavy reliance placed upon the NEC by various governments, the only effective method of influencing these governments is through the NEC amendment process. Allied's own survey shows that over half the states and cities polled either amended the NEC before adopting it or refused to adopt it at all. As the district court acknowledged, 'there is obviously an opportunity to change the mind of the legislature and . . . there is an opportunity for the defendant and the plaintiff to lobby at that level . . . . ' " (App. 18a-19a).

27 Needless to say, the Sherman Act's Rule of Reason has been consistently applied to standard-setting conspiracies. *E.g.*, ECOS Elec. Corp. v. Underwriters Laboratories, 743 F.2d 498, 502-03 (7th Cir. 1984), *cert. denied*, 469 U.S. 1210 (1985); Consolidated Farmers Mut. Ins. Co. v. Anchor Sav. Ass'n, 1980-2 Trade Cas. (CCH) ¶ 63,530, at 76,843 (10th Cir. 1980), *aff'g* 480 F. Supp. 640, 648-56 (D. Kan. 1979); E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm., 467 F.2d 178, 185-88 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973); Structural Laminates, Inc. v. Douglas Fir Plywood Ass'n, 261 F. Supp. 154, 158 (D. Or. 1966), *aff'd*, 399 F.2d 155 (9th Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969); Roofire Alarm Co. v. Royal Indemnity Co., 202 F. Supp. 166, 169-70 (E.D. Tenn. 1962), *aff'd without opinion*, 313 F.2d 635 (6th Cir.), *cert. denied*, 373 U.S. 949 (1963).

The Federal Trade Commission has also issued Administrative Opinions and Rulings proscribing standardization or certification programs that have the purpose or effect of lessening competition. *See, e.g.*, 16 C.F.R. § 15.457(e) ¶¶ 1-3 (1986).

not all—state and local governments would effectively eliminate any antitrust review of private standard making. The Court of Appeals, in accord with the *amicus curiae* views of both antitrust enforcement agencies, properly declined to expand the *Noerr* doctrine to reach so extreme a result; and there is no reason for this Court to review that eminently sound conclusion.[28]

II. Imposing Antitrust Liability for Allied's Concerted Subversion of the NFPA's Consensus Standard Making Process Will Not Chill Good-Faith Debate in Standard Making Bodies.

In attempting to manufacture a "special and important reason" for grant of the writ,[29] Allied asserts that application of the Sherman Act to its conduct "will chill good-faith debate in private code-making bodies" in violation of the First Amendment. (Pet. 12). Again, petitioner puts a question not presented by this record. The decision below does not limit anyone's right to debate or express an opinion as to the safety or suitability of any product on any occasion. Allied's conspiracy involved far more than the exercise of any First Amendment right. No amount of rhetoric can transform this vote-packing conspiracy—a "battle plan" which enlisted hundreds of know-nothing "bodies" with "instructions" on how to vote—into the "expression" of "opinion" or "debate" or "persua[sion]." (Pet. 11, 17, 12, 18). Allied's protestations of free speech have a hollow ring in light of the fact that not one of the conspirators' executives or "troops" spoke at the May, 1980 meeting in opposition to Article 331. It is fatuous to

28 Petitioner's effort to analogize this case to *Noerr* itself is unavailing. (*See* Pet. 14-15). The advertising campaign in *Noerr* was merely part of a general effort to elicit public support for the railroads' lobbying efforts. Here, in sharp contrast, Allied's actions at the NFPA were entirely outside the political arena, involving no contacts with government or appeals to the public to support direct lobbying efforts. Indeed, it is undisputed that the NFPA itself did not engage in lobbying efforts; nor could it, in light of its status as a charitable organization under the Internal Revenue Code. (*See* page 3 n.3, *supra*).

29 U.S. Sup. Ct. R. 17.1.

suggest that application of the Sherman Act to Allied's conspiracy to subvert the NFPA's processes will chill "good-faith" debate by anyone.[30]

There is simply no substance to the Petition's effort to cloak Allied's conduct in the First Amendment. "Where speech and conduct are joined in a single course of action, the First Amendment values must be balanced against competing societal interests." *City of Los Angeles* v. *Preferred Communications Inc.*, 106 S. Ct. 2034, 2038 (1986), citing *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968). As this Court established in *Roberts* v. *United States Jaycees*, 468 U.S. 609, 623 (1984), "[t]he right to associate for expressive purposes is not . . . absolute." Rather, "[i]nfringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id. Accord, Board of Directors of Rotary International* v. *Rotary Club*, 107 S. Ct. 1940, 1947-48 (1987). Here, even if—contrary to the record—one were to view Allied's conspiracy as, to some extent, an association "for expressive purposes," applying the Sherman Act to it would cause only an "incidental abridgment" of Allied's First Amendment right to expressive association "no greater than is necessary to accomplish the [Sherman Act's] legitimate purposes." *Roberts* v. *Jaycees*, *supra*, 468 U.S. at 628. *See California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 514-15 (1972) ("It is well settled that First Amendment rights are not immu-

30 Allied's conduct distinguishes this case from the district court decisions on which it relies because there was no subversion of the consensus standard making process in any of those cases. *See* Sessions Tank Lines, Inc. v. Joor Mfg. Inc., *supra*, 1986-2 Trade Cas. at 62,065; Rush-Hampton Indus. v. Home Ventilating Inst., *supra*, 419 F. Supp. at 23-24; Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit Corp., *supra*, 573 F. Supp. at 836. It is noteworthy that Allied, which was the plaintiff in *Wheeling-Pittsburgh* and which already had been sued by Carlon, elected not to appeal the district court's decision granting *Noerr* protection to concerted activity before the NFPA—a conclusion which Allied had argued to that court "would establish a dangerous precedent." (Memorandum of Law of Allied, filed May 20, 1980, at 11-12).

nized from regulation when they are used as an integral part of conduct which violates a valid statute"), citing *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949).[31]

That Allied's conspiracy was not constitutionally protected speech is most apparent when one considers the consequences of a contrary result. No one could seriously contend that the First Amendment would bar legislation by Congress or a state legislature specifically designed to protect the public from the anticompetitive consequences of the conduct demonstrated on this record. Surely, if a state may constitutionally proscribe truthful advertising of lawful conduct[32] and the NLRB may constitutionally prohibit a truthful request to the executive to enforce a valid law,[33] then Congress can constitutionally prohibit trade association members from combining to subvert consensus standard making by stacking membership meetings and causing the added voters to cast their ballots on instruction with no regard for the merits, all in order to keep a new, better or more economical product out of an industry code and, thus, off the market.

To apply *Noerr*'s antitrust exemption to the egregious subversion of consensus standard making involved in this case would, as a practical matter, remove the Sherman Act's protection from all aspects of the standard making process whenever the resulting standards are ultimately adopted by some organ of government. Since there are many thousands of privately promulgated standards covering a vast array of products, many of which are adopted in whole or in part by organs of

31 In *Giboney*, in an opinion by *Noerr*'s author, Justice Black, this Court unanimously held that a state could constitutionally prohibit, under its general prohibition of conspiracies in restraint of trade, a union's peaceful and truthful picketing. *Cf.* National Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679, 697 (1978) (ban on standard making organization's expressing "opinion [or] policy statement . . . implying that competitive bidding is unethical" is constitutional).

32 Posadas De Puerto Rico Assocs. v. Tourism Co., 106 S. Ct. 2968, 2976-80 (1986).

33 Sure-Tan Inc. v. NLRB, 467 U.S. 883, 894-97 (1984).

government, application of the *Noerr* doctrine to legitimize Allied's conspiracy would enable members of private organizations that this Court has recognized are "rife with opportunities for anticompetitive activity"[34] to seize such opportunities in order to injure their rivals and deprive the public of new, innovative and more economical products.

But that is not all. It would also undermine the credibility of standard making throughout the economy (and thus deprive the public of its benefits), since the public could not know whether the standards promulgated by trade associations are truly the product of a "consensus" on the merits, or whether, as here, they are simply the result of economically motivated, private combinations of competitors who have subverted the standard making process.

In this regard, Allied's protestations that its subversion of the standard making process to exclude ENMT was motivated by a concern for safety are beside the point. (*See* Pet. 14-15). For, as this Court held in *FTC* v. *Indiana Federation of Dentists*, 106 S. Ct. 2009 (1986), the belief that a restraint of trade is lawful because it allegedly prevents consumers from making "unwise and even dangerous choices" is " 'nothing less than a frontal assault on the basic policy of the Sherman Act.' " *Id.* at 2020, quoting *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 695 (1978). Even assuming the best of motives—although Allied's motive to save its conduit business from competition was conceded here (*see* page 5, *supra*)—if one may rig a code to *ex*clude an unsafe product, one may equally rig a code to *in*clude one.[35]

34 American Soc'y of Mech. Eng'rs v. Hydrolevel, *supra*, 456 U.S. at 559, 571.

35 Allied's repeated reliance on the fact that its conduct did not violate the NFPA's rules is misplaced (*see* Pet. 11, 16, 20), for the Sherman Act "is its own measure of right and wrong." Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 49 (1912). *See also* National Soc'y of Prof. Eng'rs v. United States, *supra*, 435 U.S. at 688. Plainly, if the rules or by-laws of a trade association, or the abuse of such rules, may contravene the Sherman Act, then the absence of a rule cannot shelter conduct that unreasonably

It would constitute a supreme irony to invoke the very factor that makes standard making organizations' potential for inflicting anticompetitive harm so great—the influential role they play in the adoption of standards by governmental entities—as a basis for providing them and their members a blanket antitrust immunity. The *Noerr* doctrine—narrowly crafted to preserve the right to petition the *government*—is not so perverse as to license combinations of competitors to deprive the public of new and economical products by subverting *private* industry codes. Nothing in the Court of Appeals' opinion infringes Allied's or anyone else's right to petition. The only conduct that the decision will "chill" is conspiracies, such as Allied's, that exclude rivals from the marketplace by subverting private standard making proceedings, thus "impair[ing] the ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal costs of providing them." *FTC* v. *Indiana Federation of Dentists*, *supra*, 106 S. Ct. at 2018. The sparing exercise of this Court's certiorari jurisdiction is not warranted to review a decision which correctly refused to accord such anticompetitive conduct blanket Sherman Act immunity through an unsound extension of the *Noerr* doctrine.

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restrains trade. *See*, *e.g.*, Arizona v. Maricopa Cty. Med. Soc'y, 457 U.S. 332 (1982); National Soc'y of Prof. Eng'rs v. United States, *supra*, 435 U.S. at 692-96; Associated Press v. United States, 326 U.S. 1, 14-19 (1945); American Soc'y of Mech. Eng'rs v. Hydrolevel, *supra*, 456 U.S. at 570-74.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition should be denied.

Dated: August 21, 1987
New York, New York

Respectfully submitted,

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PROOF OF SERVICE

I, Fredric W. Yerman, attorney for Respondent herein, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 21st day of August, 1987, I caused to be served by hand three copies of the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari on Marvin E. Frankel, Kramer, Levin, Nessen, Kamin & Frankel, 919 Third Avenue, New York, New York 10022. I further certify that all parties required to be served have been served.

Dated: August 21, 1987

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(4)

Supreme Court, U.S.
FILED
SEP 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-157

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALLIED TUBE & CONDUIT CORPORATION,

Petitioner,

—v.—

INDIAN HEAD, INC.,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI AND REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI AND REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

On September 2, 1987, several weeks after our petition was filed, the Ninth Circuit filed its opinion in *Sessions Tank Liners, Inc. v. Joor Manufacturing, Inc.*, Nos. 86-6208; 86-6470. On the critical issue presented by the petition, the Ninth Circuit holds—in direct opposition to the holding of the Second Circuit in the opinion below—that *Noerr* shields from antitrust liability conduct within a private code-making association aimed at influencing ensuing legislation. A copy of the slip opinion is appended as an Appendix.

We discuss *Sessions* and the inter-circuit conflict it presents in Point 1, *infra*. The conflict is another compelling reason for granting certiorari. In Points 2 and 3, we respond to Carlon's Brief in Opposition ("Br. in Opp."), which mainly sidesteps the point of our petition.

1. A split in the circuits has arisen concerning the basic issue presented by the petition

On the basic *Noerr* issue the Ninth Circuit decision in *Sessions* conflicts with the decision of the Second Circuit in this case. Furthermore, in reaching its decision, the Ninth Circuit used the same analysis we urge upon this Court in our petition.

a. The facts in *Sessions* closely parallel those in this case

Joor manufactures metal tanks used for the underground storage of hazardous liquids, principally gasoline. Plaintiff Sessions repairs leaks in these tanks by coating their inner surface with a protective lining, while the tank remains underground. Joor and Sessions are competitors. A tank user who elects to use Sessions' lining process to repair a leaky tank will not buy a new replacement storage tank from Joor.

Joor successfully lobbied the Western Fire Chief's Association ("WFCA") to exclude in-ground tank lining from the Uniform Fire Code ("UFC") promulgated by the association, arguing that above ground inspection is necessary to ascertain whether the tank walls can withstand ground pressure. The practical effect of the exclusion was severely to limit Sessions' market: once the user was required to remove his tank from the ground he would have no incentive to use Sessions' tank lining process as he could at comparable incremental cost buy a new one. (App. 35a).

WFCA is a non-profit, voluntary membership organization composed of public officials involved in enforcing fire safety regulations. It has no official governmental status and the UFC has no legal force until local governments adopt or enforce its provisions. The UFC is heavily relied upon by local governments in promulgating legislation concerning fire safety. (App. 35a). Thus, for *Noerr* purposes the WFCA and the UFC are identical to the NFPA and its model code, the NEC, at issue in this case.

Joor's lobbying was in key respects even more aggressive than was the lobbying of Allied in this case. Joor's president, Howard Robbins, became a member of the WFCA subcommittee that was considering including tank lining in the UFC. Neither Sessions nor any other firm in the tank lining field had a voting representative on the same subcommittee. It was Robbins himself who moved to amend the UFC to require leaking tanks to be removed from the ground, an amendment obviously calculated to prevent Sessions and similar companies from repairing tanks (App. 36a). Moreover, under allegations taken as true for the summary judgment in question, Joor had misrepresented a number of critical facts in its presentation to the WFCA and had in effect bribed various fire chiefs who were important decision makers in the code-making process (App. 46a).

After its process was excluded from the UFC, Sessions brought suit under sections 1 and 2 of the Sherman Act, alleging that Joor had combined with other tank manufacturing interests unreasonably to restrain trade by its illicit conduct to rig the Code against Sessions and other tank repairers. (App. 37a).

b. The *Sessions* court's reasons for applying *Noerr* apply to the instant case

On the foregoing facts, substantially similar to those of the present case, the Ninth Circuit held that *Noerr* and its progeny protect Joor from Sherman Act liability unless a "sham" exception applies. The court's decision is based on the precise reasons urged in our petition, as a reading of the appended opinion will disclose.

c. The discussion in *Sessions* of the decision below and the "sham" exception does not alter the fundamental conflict on the *Noerr* issue

The Ninth Circuit has recognized that its holding as to *Noerr*'s reach basically conflicts with that of the Second Circuit in this case. It also appears to regard the Second

Circuit's decision as anomalous on First Amendment grounds that are, again, urged in our petition. As the Ninth Circuit says:

> Thus *Indian Head* in effect suggests that defendants may have treble damages simply for bringing forth undisputed evidence that a rival's product is actually hazardous. The *Noerr* doctrine exists precisely to prohibit such result.

(App. 45a n.6).

Having demonstrated the basic divergence on *Noerr* and its reservations about the Second Circuit decision on First Amendment grounds, the Ninth Circuit goes on to say that the Second Circuit could have reached the same result by holding that Allied's conduct came within the sham exception to *Noerr*.

This discussion in the Ninth Circuit's decision about how Allied's conduct comes within the sham exception is not in fact reconcilable with the record herein. On the actual facts, as found by the jury in this case, Allied's conduct could not be brought within Sherman Act proscriptions if the sole basis for doing so were that its attempts to influence legislation were "sham." The jury's specific findings were (A. 474A-474J):

- that Allied had a genuine belief that Carlon's product was unsafe;
- that Allied's actions were motivated in part by that belief;
- that Allied's conduct did not violate any of the rules of the NFPA;
- that Allied's conduct did not deprive Carlon of full and effective access to the NFPA and to its appellate processes.

These specific findings preclude the possibility that Allied's conduct could be held actionable by resort to the sham exception.

The sham issue was fully argued and briefed both in the District Court and in the Court of Appeals. As Judge Sprizzo states in his opinion:

> with respect to the sham exception, the court finds absolutely no basis to apply the sham exception to the Noerr-Pennington doctrine. The court is unaware of, nor has any case been directed to the court's attention, of any court ever applying the sham exception to Noerr-Pennington in a case where, as here, there was a genuine attempt to influence a legislative body arising out of a genuine concern for safety, and, concededly, a factual basis for that concern.

(App. 28a).

No doubt the Second Circuit was aware of the long line of cases that support Judge Sprizzo's holding on the sham issue and that—in light of the jury's findings—render sham a non-issue in this case. No doubt, too, the Circuit was driven to the conclusion that if the decision of the District Court were to be reversed the sole ground for doing so would be the one enunciated: that *Noerr* does not immunize actions in a private code-making body that only indirectly influence ensuing legislation. And on this ground so enunciated, the Ninth Circuit and the Second Circuit simply disagree. The conflict can only be resolved by this Court. Insofar as the "sham" exception may come into play at all, the essential divergence on this score as well further bespeaks the need for authoritative guidance by this Court.

2. Carlon misreads the *Noerr* doctrine as not applying to cases involving "direct market impact"

The respondent argues that *Noerr* only protects political activity having no direct market impact: ". . . when private conduct itself unreasonably restrains trade by directly impacting the market place, Noerr and the policies it reflects are not pertinent. . . ." Br. in Opp. 17.

This thesis is plainly wrong. The private conduct in question in *Noerr* itself had a direct impact on the market place. *Noerr* involved the Railroad Association's deceptive publicity campaign designed to destroy the competing trucking industry's goodwill and to promote support for legislation shackling the trucker's ability to compete. The deceptive publicity campaign was not aimed directly at the Congress and had the important if not overriding purpose of injuring the truckers "in ways unrelated to the passage or enforcement of law." *Noerr*, 365 U.S. at 133. Nevertheless, this conduct of the Railroad Association—conduct which had a direct market impact quite apart from its legislative impact—was held by this Court to be protected from antitrust liability. *Id.* at 142-144.

3. Respondent's claim of direct market impact, based on its stigma theory, was not the theory it presented to the jury and is not supported by the record

Absent any claim or proof that Carlon had suffered injury apart from that arising from legislative enactment of the NEC, Carlon had no Sherman Act claim against Allied at all. As argued in our petition (pp. 19-20), and as the Ninth Circuit stated in *Sessions*,

> The Sherman Act was not intended to make private parties liable, in the ordinary case, for governmental acts. Thus where the alleged restraint of trade 'was the act of a public official who was not claimed to be a co-conspirator' a private defendant is not ordinarily liable for any damages caused thereby. *Pennington*, 381 U.S. at 671.* * *

(App. 41a-42a).

At the post-trial hearing on the *Noerr* issue, Carlon sought for the first time in the history of this litigation to avoid these *Noerr*-related causation problems by claiming it had suffered injuries "independent" of those caused by legislative enactment of the NEC, injuries said to have arisen from the "stigma" of its exclusion from the 1981 NEC and from Allied's marketing

of that exclusion. Now, it argues (Br. in Opp. 12) that the stigma issue was litigated, that Judge Sprizzo did submit the issue to the jury, and that a finding in its favor on the stigma issue is subsumed in the favorable jury verdict on the ultimate issue of antitrust liability.

In fact, however, the stigma issue was never in the case. Carlon's argument ignores Judge Sprizzo's specific holding—supported by his detailed analysis of the record—that the stigma claim was *not* pleaded, *not* proven and was *not* submitted to the jury for its determination.

The complaint made no mention of the stigma theory and instead expressly urged that respondent's injury flowed from the NEC's widespread adoption by states and municipalities (A. 24.). When respondent for the first time raised the stigma argument at a post-trial hearing in urging Judge Sprizzo not to apply *Noerr*, he called the argument a "distortion" of what was presented to the jury (A. 2045), and rejected it decisively:

> THE COURT: I think your theory of damages all along was that your damages flowed from the fact that you were not approved and therefore not adopted by the state legislatures involved.

(A. 2046).

Later, in his oral opinion, Judge Sprizzo was even more emphatic in explaining that respondent had never litigated the stigma theory (A 29a-30a, 31a-32a).

In sum, the tardy stigma theory is a diversion, leaving plain and certain the significant issue, now the subject of a conflict, as to the applicability of *Noerr* to private code making bodies like the NFPA and the WFCA.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 17, 1987

APPENDIX C

Opinion of the United States Court of Appeals for the Ninth Circuit

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 86-6208; 86-6470

D.C. No. CV-84-6363-MRP

SESSIONS TANK LINERS, INC. dba
SOUTHWEST TANK LINERS, INC.,
Plaintiff-Appellant,

—v.—

JOOR MANUFACTURING, INC., et al.,
Defendants-Appellees.

Argued and Submitted
April 8, 1987—Pasadena, California

Filed September 2, 1987

Before: Joseph T. Sneed, Robert Boochever and
David R. Thompson, *Circuit Judges*.

Opinion by Judge Sneed

Appeals from the United States District Court
for the Central District of California
Mariana R. Pfaelzer, *District Judge*, Presiding

COUNSEL

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David E. Lundin, San Diego, California, *for the defendants-appellees*.

William J. Meeske, Los Angeles, California, Catherine G. O'Sullivan and Dean C. Graybill, Washington, D.C., *for the amici curiae*.

SNEED, *Circuit Judge*:

Joor Manufacturing (Joor) successfully sought to have the Western Fire Chiefs Association (WFCA) amend its influential model fire code in a manner disadvantageous to Sessions Tank Liners, Inc. (Sessions), a competitor. Sessions sued Joor for violating the Sherman Act. The district court granted the defendant summary judgment, ruling that the *Noerr-Pennington* doctrine exempted Joor's conduct from antitrust liability. Sessions appeals.

We conclude that legitimate efforts to influence or lobby private, model code associations *are* protected by the *Noerr-Pennington* doctrine. However, we also conclude that "abuses" of the code-promulgating process designed primarily to harm competitors are a "sham" and fall outside *Noerr-Pennington* protection. Because Sessions has stated a very limited "sham" exception claim not considered by the court below, we reverse and remand for further proceedings.

I.

FACTS

Joor manufactures metal tanks used for the underground storage of hazardous fluids, principally gasoline. Sessions repairs leaks in these tanks by puncturing them while still underground and coating their inner surface with an epoxy

lining. Removing a tank to repair it aboveground is so costly that customers will ordinarily buy new tanks if this underground lining process is not available. Thus appellant's repairs compete directly with Joor's sales.

According to Sessions, tank lining has been in successful use for some thirty years. In 1980, however, demand for appellant's service began to decline, particularly in California. At the same time, fire department officials in various California localities began denying Sessions the permit necessary to perform its work.

The reason, Sessions alleges, has its source in a proposed amendment to the WFCA's Uniform Fire Code (the Code), a model fire safety code highly influential in the western states.[1] The WFCA is a nonprofit, voluntary membership organization established in 1891. Although it has no official governmental status, the WFCA limits its voting membership exclusively to public officials, most of whom are involved in enforcing fire safety regulations in their respective jurisdictions. The Code has no legal force until local governments choose to adopt or enforce its provisions.

In 1978 the WFCA created a subcommittee to revise Article 79 of the Code, which deals with the use and storage of inflammable fluids.[2] One of the Article 79 subcommittee's tasks was to develop safety standards for the underground

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1 The record does not make clear exactly which states, counties or municipalities have enacted the Code into law, or to what extent local legislatures have deviated from its terms when adopting it. According to the WFCA, the Code "has been adopted in a majority of the counties, cities and other political subdivisions in the ten western United States (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Utah and Washington) and is widely adopted in the thirteen southwestern and midwestern states." Brief of the WFCA et al., amici curiae, at 5. In addition, local fire officials may enforce Code provisions or standards even when their respective localities have not enacted these provisions or standards into law.

2 The WFCA revises the Code according to the following procedures. An ad hoc subcommittee is established to consider particular issues. Representatives of private industry are often invited to serve thereon. At the time of the events in question, such private industry members had full voting

repair of storage tanks. The alleged safety problem posed by underground repair lies in the possibility that corrosion—which might have caused the leakage—will go undetected. Sessions' epoxy lining stops leaks but does not strengthen the tank walls. Joor insists that aboveground inspection is necessary to ascertain whether the leaking tank's walls can continue to withstand ground pressure.

Joor's president, Howard Robbins, became a member of the Article 79 subcommittee and there argued strenuously that the underground tank lining process should be completely prohibited. On March 17, 1981, at a subcommittee meeting, Robbins moved to amend the Code to require leaking tanks to be removed from the ground. The proposed amendment was calculated to prevent Sessions and similar companies from repairing tanks. Removing a tank from the ground prior to the tank lining process would destroy the cost advantage of that process. Robbins's motion carried unanimously.

Neither Sessions nor any other firm in the tank lining field had a voting representative on the Article 79 subcommittee meeting. However, Sessions was not barred entirely from participating in the subcommittee's deliberations. It was permitted to submit materials to the subcommittee and to have a representative offer an oral defense of its process at the March 17 meeting. Subsequently, representatives for Sessions and

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powers within the subcommittee on which they served. (The WFCA has now changed its rules so that private industry representatives no longer have voting power even at the subcommittee level.) If a subcommittee votes to propose an amendment to the Code, the proposal is referred to the WFCA's standing Code Committee, which publishes a notice in two national trade journals and then holds meetings on the proposed amendment. Anyone may attend these hearings, speak and present evidence, but only active WFCA members—no private industry representatives—may vote. After the hearings, both the original proposal and the Code Committee recommendation are again published in the trade journals. Finally, at the WFCA annual conference, where once more anyone may participate but only WFCA members may vote, the entire body of the WFCA approves or rejects the proposed amendment.

other tank lining companies presented arguments and evidence at the Code Committee meetings and at the WFCA annual conference. Nonetheless, these two bodies both ratified the subcommittee's amendment, which thereby became part of the Code in 1982.

Sessions brought suit under sections 1 and 2 of the Sherman Act, alleging that Joor combined with other tank manufacturing interests to procure an unreasonable restraint of trade, and that Joor was attempting to monopolize the relevant market. Sessions further accused Robbins of making misrepresentations to fire officials inside and outside the WFCA, of conspiring with the same, and of denying Sessions access to the Article 79 subcommittee.

II.

ISSUES

This case requires that we address two issues: (1) Assuming Robbins committed no improprieties in his lobbying efforts, can his successful persuasion of the WFCA constitute an antitrust violation under the Sherman Act? (2) If not, could the alleged improprieties by Robbins nonetheless state an antitrust claim? The first issue concerns the applicability of the *Noerr-Pennington* doctrine, and we find that *Noerr-Pennington* does apply in this context. The second concerns the applicability of that doctrine's "sham" exception, and we find that it too applies in this case, although only in a limited fashion.

III.

ANALYSIS

A. *Applicability of the* Noerr-Pennington *Doctrine*

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), defendants were a consortium of railroad interests that had successfully advocated legislation and executive action harmful to the emerging trucking industry. As here, plaintiff alleged that defendants' cam-

paign had employed misrepresentations and other improper tactics. The first question addressed by the Court, however, was whether the Sherman Act prohibited the railroads' concerted lobbying efforts regardless of any improprieties: whether, that is, the lobbying itself was a "combination . . . in restraint of trade." 15 U.S.C. § 1.

The Court answered in the negative. The Sherman Act regulates "business activity," the Court held, not "political activity." 365 U.S. at 137. The Court supported its conclusion with references to the constitutional right of petition, the value of public input into the political process, and legislative intent. *See id.* at 137-40.

In subsequent cases, the Court has made clear that *Noerr* applied to the petitioning of all governmental bodies. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 (1965). In the case before us, however, the defendant's efforts were directed at a private association serving as a conduit to local legislatures and various governmental agents. If *Noerr-Pennington* does *not* apply here, then Joor could potentially be liable in antitrust simply for bringing to the WFCA's attention true and persuasive information about the safety hazards of a competitor's product—if Joor did so in combination with others or in an attempt to monopolize.

We hold that *Noerr-Pennington* applies. It immunizes proper lobbying—either singly or in combination with others—of a private association engaged in promulgating an important model code to influence legislative and executive decisions.

Our holding rests on the various constitutional, policy and statutory considerations that underlie the *Noerr-Pennington* doctrine. Each of these considerations points clearly to the conclusion that *Noerr-Pennington* applies here.

1. *Constitutional interests.*

Noerr-Pennington exists in large part to protect the constitutional right to petition the government. *Noerr*, 365 U.S. at 138; *see City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 399 (1978). Joor argues that the WFCA is in effect a "governmental" body exercising legislative or quasi-legislative powers. Sessions emphasizes the WFCA's formally private status. The labels "governmental" and "private" are, however, of limited utility.

Petitioning, for constitutional purposes, is not confined to entreating the government directly for relief. *See, e.g., Brotherhood of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1, 7 (1964) (right to petition courts extended to workers' cooperative plan to advise one another of legal rights). Instead it encompasses appeals to some who are not governmental actors but who are nevertheless involved in the political process. Courts have repeatedly construed *Noerr-Pennington* in this manner.

In *Noerr* itself, an important component of the railroads' strategy was to exert pressure on governmental actors through the medium of public opinion. The Court held that the railroads' "publicity campaign to influence governmental action falls clearly into the category of political activity" shielded from antitrust liability. 365 U.S. at 140-41. We have applied *Noerr-Pennington* to an advertising campaign designed to influence a state's voter initiative process. *See Subscription T.V., Inc. v. Southern Cal. Theatre Owners Ass'n*, 576 F.2d 230, 232 (9th Cir. 1978). Finally, attempts to persuade private parties to join in a commercial boycott have also received *Noerr-Pennington* protection where the boycott was part of an effort to procure governmental action. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907, 913-15 (1982); *Missouri v. National Org. for Women, Inc.*, 620 F.2d 1301, 1314 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980).

So too, Joor's efforts, albeit directed at an ostensibly private body, were without doubt part of a plan ultimately to procure favorable legislation. *See Federal Prescription Serv. Inc. v.*

American Pharmaceutical Ass'n, 471 F.Supp. 126, 130 (D.D.C. 1979) (Gesell, J.) (efforts to induce private medical associations to adopt favorable position protected under *Noerr* as "indirect attempts to influence governmental behavior"), *aff'd*, 663 F.2d 253, 262 n.6 (D.C. Cir. 1981) (alternative holding), *cert. denied*, 455 U.S. 928 (1982). The WFCA, whether designated as "public," "private," or even "quasi-governmental," plays an important and generally accepted role in the legislative process of the western states. The WFCA's substantial power and the Code's impact on local fire safety laws cannot be denied. For this reason the First Amendment right of petition affords protection to those seeking to influence the WFCA's decisions.

Moreover, the right to petition is not the only First Amendment guarantee on which *Noerr-Pennington* rests. Rights of association are also implicated. *See California Motor Transport*, 404 U.S. at 510; *see also Claiborne*, 458 U.S. at 911 (rights of association and petition are inseparable). Joor was undoubtedly exercising its associational rights when it participated in a private organization to advance its legislative causes, whatever they may have been. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958). Thus, First Amendment purposes would be served by extending *Noerr-Pennington* to the circumstances of this case.[3]

2. *Political Process Interests.*

Noerr-Pennington also promotes the effective operation of our political processes. *See City of Lafayette*, 435 U.S. at 399; *In re Airport Car Rental Litigation*, 693 F.2d 84, 86 (9th Cir. 1982), *cert. denied*, 462 U.S. 1133 (1983). As the Court saw it

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3 By itself, however, this conclusion does not end the inquiry into either *Noerr*'s applicability or Joor's liability. Antitrust law often impinges on First Amendment interests. Boycotts include an associational component, and an agreement to fix prices may of course be speech. Nonetheless, these activities can in certain circumstances be prohibited. The Sherman Act necessarily presupposes that the "right of business entities to 'associate' to suppress competition may be curtailed." *Claiborne*, 458 U.S. at 912; *see National Soc'y. of Prof. Eng'rs v. United States*, 435 U.S. 679, 697 (1978).

in *Noerr*, "the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." 365 U.S. at 137. Hence the result in *Noerr* was deemed necessary in order not to "deprive the government of a valuable source of information." *Id.* at 139. This concern too is applicable here.

Municipal and other local lawmakers rely on the WFCA's investigatory work in approving or disapproving myriad products and safety standards. In many instances it would be either impossible or inefficient for each local government to do otherwise. Most localities lack both the required resources and the talent. At the same time, it also would be inefficient if not impossible for particular businesses effectively to lobby every city or county council that adopts a fire code. *See Wheeling-Pittsburg Steel Corp. v. Allied Tube & Conduit Corp.*, 573 F.Supp. 833, 838 (N.D. Ill. 1983). It follows that the WFCA renders valuable civic services and that the information it receives is quite important in the legislative process.

Within the WFCA, the various committees and subcommittees depend largely on the input of commercially self-interested parties for the expertise and research necessary to an informed decision. Self-interested information may be biased information, but "it is quite probably people with . . . a hope of personal advantage who provide much of the information upon which governments must act." *Noerr*, 365 U.S. at 139. No one seriously assumes otherwise. The policy interests emphasized in *Noerr-Pennington* require that "free-flowing communication" be encouraged at all levels of governmental decisionmaking. *See Airport Car Rental Litigation*, 693 F.2d at 86. This policy also points in favor of *Noerr-Pennington*'s applicability here.

3. *Statutory considerations.*

Finally, *Noerr-Pennington* rests on sound statutory grounds. To prevail under the Sherman Act, a plaintiff must not only show an unlawful restraint of trade, but also prove that the defendant is legally responsible for this restraint. The Sherman

Act was not intended to make private parties liable, in the ordinary case, for governmental acts. Thus where the alleged restraint of trade "was the act of a public official who is not claimed to be a co-conspirator," a private defendant is not ordinarily liable for any damages caused thereby. *Pennington*, 381 U.S. at 671. A leading antitrust treatise has expressed this aspect of *Noerr-Pennington* in terms of "proximate cause":

> private parties may have influenced or persuaded the government to act, but the government's decision to act reflects an independent governmental choice, constituting a supervening "cause" that breaks the link between a private party's request and the plaintiff's injury.

P. Areeda & H. Hovenkamp, *Antitrust Law* 4 (Supp. 1986).[4] Within our own circuit, Judge Schwarzer has also emphasized this point. *See In re Airport Car Rental Antitrust Litigation*, 521 F. Supp. 568, 574 (N.D. Cal. 1981) ("if plaintiff suffered injury, it resulted from the acts of public officials . . . not the joint action of defendants"), *aff'd*, 693 F.2d 84 (9th Cir. 1982), *cert. denied*, 462 U.S. 1133 (1983).

These considerations apply here. The Article 79 amendment as initially proposed by Joor's president and later accepted by the entire WFCA had no legal force and little injurious effect until it was adopted by local legislatures or enforced by local fire officials. Absent improprieties in the lobbying process, the acts of these governmental officials should not make Joor liable to Sessions under the Sherman Act. *See Noerr*, 365 U.S. at 135-36 (lobbying not actionable under Sherman Act because private parties not responsible for governmental restraints of trade).

For all the foregoing reasons, we conclude that *Noerr-Pennington* applies to Joor's lobbying efforts within the WFCA.

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4 *See also* Hurwitz, *Abuse of Governmental Processes, the First Amendment, and the Boundaries of* Noerr, 74 Geo. L.J. 65, 123 (1985). ("In the absence of egregious conduct, a governmental decision favorable to the petitioner will negate the proximate causation of any competitive injury.").

B. *Applicability of* Noerr-Pennington*'s "Sham" Exceptions*

Sessions alternatively contends that Joor's conduct fell within the "sham" exception to the *Noerr-Pennington* doctrine. Robbins, Sessions alleges, deprived Sessions of meaningful access to the Article 79 subcommittee, conspired with various public fire officials, and misrepresented facts both inside and outside the WFCA. The crucial question, as we see it, is whether these asserted improprieties amounted to an "abuse of process," *Clipper Exxpress v. Rocky Mtn. Mot. Tariff Bur., Inc.*, 690 F.2d 1240, 1259 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983); *Rodgers v. FTC*, 492 F.2d 228, 232 n.6 (9th Cir.), *cert. denied*, 419 U.S. 834 (1974), corrupting the WFCA's decision. Before turning to each of appellant's allegations concerning Joor's abuse of the WFCA's process, a recent decision of the Second Circuit must be considered.[5]

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5 We must also dispose of a preliminary objection. Joor succeeded in its efforts to amend the Code and thus local fire safety laws. It claims, therefore, that its petitioning was "genuine" and cannot be called a "sham." Not so.

To be sure, the clearest examples of sham petitioning are those in which the defendant's aim was to harm a competitor directly, not through the governmental process that he purported to invoke. *See, e.g., Energy Conservation, Inc. v. Heliodyne*, 698 F.2d 386, 389 (9th Cir. 1983) (baseless lawsuit allegedly designed to cause competitor expense and to generate adverse publicity). Perhaps because the term "sham" suggests this sort of situation, courts have sometimes asserted the mistaken proposition for which Joor contends. *See, e.g., WIXT Television, Inc. v. Meredith Corp.*, 506 F. Supp. 1003, 1032 (N.D.N.Y. 1980) ("by definition a successful claim cannot be 'sham' ").

But there are other instances of sham petitioning in which the defendant genuinely seeks to achieve his governmental result, but does so *through improper means. See, e.g., Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986, 993-94 (9th Cir. 1979), (infringement suit based on fraudulently obtained patent is in "bad faith" and thus actionable in antitrust despite *Noerr*), *cert. denied*, 444 U.S. 1025 (1980); *Israel v. Baxter Labs., Inc.*, 466 F.2d 272, 278-79 (D.C. Cir. 1972) (misrepresentations inducing decision by administrative tribunal are actionable); *Outboard Marine Corp. v. Pezetel*, 474 F. Supp. 168, 179 & n.19 (D. Del. 1979). In such cases, the defendant may well succeed in procuring the desired governmental action, but has nonetheless misused his petitioning privilege. Thus defendant's "success or failure" is

1. *The Second Circuit case.*

The Second Circuit recently held *Noerr-Pennington* inapplicable in a case involving a model code association much like the WFCA. *See Indian Head, Inc. v. Allied Tube & Conduit Corp.*, 817 F.2d 938, 943 (2d Cir. 1987). Superficially, *Indian Head* is contrary to our resolution of the first issue. In fact, however, our difference with the Second Circuit is not so deep as it might appear.

In *Indian Head*, defendant enrolled over 150 new members—most of whom were defendant's employees or agents—into the association and thereby won a pivotal vote by a slim majority. *Id.* at 940-41. The court found that *Noerr-Pennington* did not protect such conduct. We agree with this result; we do not agree, however, that the *Noerr-Pennington* doctrine is generally inapplicable to "model code association" cases.

The essential flaw in the Second Circuit's analysis, as we see it, is that the court conflated the question of whether *Noerr-Pennington* applied with the distinct question of whether its "sham" exception was also applicable:

> Simply put, [defendant's] conduct did not constitute petitioning of the government within the meaning of *Noerr-Pennington*; rather, its conduct was a subversion of the legitimate purposes of the [model code association].

Indian Head, 817 F.2d at 945. Although we think the Second Circuit correctly denied immunity in *Indian Head*, the proper analysis of such "subversion" should focus on the applicability of *Noerr-Pennington*'s exceptions.

In saying this we recognize that the court in *Indian Head*, by restricting *Noerr-Pennington* to direct petitioning of the gov-

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"one indicator" of whether his petitioning was a sham, *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 903 (9th Cir. 1983), but it is not dispositive.

Commentators occasionally urge courts to use the word "sham" only when referring to disingenuous—rather than unethical—petitioning. But in both cases there is a pretense of seeking an independent, impartial decision. Thus both may fairly be called shams. *See* Hurwitz, *supra* note 4, at 109.

ernment, simplified the law by reducing drastically the scope of the "sham" exception. On the other hand, it complicated the law by requiring that the antitrust law develop the permissible practices of model code associations, their members, and participating non-members. It is unlikely that this exchange will result in a net simplification.[6]

2. *Exclusion from the Article 79 Subcommittee.*

Sessions argues that it was denied meaningful access to the WFCA because it had no voting representative on the Article 79 subcommittee. Although denial of access to a decision-making tribunal can provide grounds for a "sham" exception claim, *see California Motor Transport*, 404 U.S. at 511-12, there can be no such claim here. Even if Sessions had a valid claim based on exclusion from the subcommittee, it has offered no evidence that Joor, rather than the WFCA, was responsible for this exclusion.

3. *Conspiracy.*

Antitrust immunity under *Noerr-Pennington* does not extend to private parties who have entered into a "conspiracy" with governmental actors. *See Clipper Exxpress*, 690 F.2d at 1252 n.17; *Harman v. Valley Nat'l Bank*, 339 F.2d 564, 566 (9th Cir.

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6 A few other observations with respect to the *Indian Head* case may be helpful. The Second Circuit stressed that private bodies, unlike governmental actors, cannot be assumed to be acting in the public interest. *See* 817 F.2d at 943-44. True or not, this point overemphasizes the policy aspect of the *Noerr* doctrine at the expense of its other components. The court gave short shrift to antitrust defendants' petitioning rights in situations where they had not "subverted" the organization's code-promulgating process, and it made no mention at all of their associational rights, which are plainly implicated. More troubling still, the court held that defendant could not try to justify the organization's failure to approve plaintiff's product (which formed the basis of the lawsuit) by showing that plaintiff's product was in fact unsafe: "The 'objective validity' of a restraint of trade has never been a defense to an antitrust charge . . . ." *Id.* at 947. Thus *Indian Head* in effect suggests that defendants may owe treble damages simply for bringing forward undisputed evidence that a rival's product is actually hazardous. The *Noerr* doctrine exists precisely to prohibit such a result.

1964); P. Areeda & H. Hovenkamp, *Antitrust Law* 20-25 (Supp. 1986). Sessions introduced evidence below showing that Joor routinely entertained WFCA members and other local fire officials and provided them with certain "promotional gifts" such as coffee mugs and tape measures. The district court concluded, however, that this evidence failed to raise a triable issue of conspiracy. We agree.

Joor's efforts to curry favor with WFCA members may have been somewhat indelicate, but they provide no evidence of any unlawful agreement. *See Metro Cable Co. v. CATV, Inc.*, 516 F.2d 220, 230-31 (7th Cir. 1975) (on motion to dismiss) (allegations of campaign contributions, even if true, do not provide basis to withhold *Noerr-Pennington* immunity). Sessions, it develops, has offered no "specific factual support of the allegations of conspiracy," which this court requires for summary judgment purposes. *See Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665, 672 (9th Cir. 1980).

We must acknowledge, however, that the fact that Robbins sat of the very subcommittee that launched the amendment so favorable to Joor is unsettling. The spectre raised by this circumstance is that a body ostensibly devoted to the public good—and possessed of considerable power because of this reputation—may have been "captured" by particular private interests. *See generally* Wiley, *A Capture Theory of Antitrust Federalism*, 99 Harv. L. Rev. 713 (1986). Private standards-setting associations are particularly vulnerable to this sort of abuse. *See American Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 571 (1982). In essence this was the situation in *Indian Head*, where certain steel interests "took over" the model code association on the eve of a critical vote by enrolling hundreds of new members drawn from their own ranks. Such conduct constitutes exactly the kind of abuse of process that the "sham" exception to *Noerr-Pennington* serves to weed out.

Despite the fact that Robbins's position on the Article 79 subcommittee creates an appearance of impropriety, Sessions has not made a sufficient showing that Joor or other tank manufacturing interests combined to capture the WFCA. Sessions has not alleged that anyone on the subcommittee other than Robbins had a financial interest in the proposed amendment. Nor has Sessions offered evidence that Robbins in fact exerted an improper influence over any WFCA members or exercised improper control over WFCA procedures or voting. The entire WFCA membership, consisting exclusively of public officials, had final authority to accept or reject the proposed amendment, and Sessions has provided us with no reason to doubt their integrity.[7]

4. *Misrepresentation.*

The gravamen of Sessions's accusations of impropriety is that Joor persuaded the WFCA by the use of deceptive material. In particular, Sessions challenges a letter that Robbins submitted to the Article 79 subcommittee in which he summarized his objections to the underground tank lining process. Robbins wrote that:

> [T]wo certainties exist:
>
> 1. When leakage is encountered, weakened metal exists, and,
> 2. It is difficult to ascertain remaining metal thickness from an observation point inside the tank.
>
> Acceptance of tank lining, as is being proposed, implies the discarding of UL 58 or equivalent strength requirements.

E.R. at 702-03.

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7 If the WFCA were an association of private interests putatively engaged in self-regulation, Sessions would have a very different antitrust claim. Joor's liability would probably not be altered, but the WFCA as a whole might then be subject to suit. *Cf. United States v. National Soc'y of Professional Eng'rs*, 435 U.S. 679 (1978) (engineers' association was liable in antitrust for taking position that competitive bidding was unethical); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961) (allegations that gas producers' and sellers' association had with anticompetitive intent refused to approve and to service plaintiff's product stated antitrust claim). But Sessions has not sued the WFCA as a whole, nor impugned the integrity of its ultimate decisionmaking process.

According to Sessions, all three of these representations were false. First, there may be no weakness in the metal of a leaking tank. Second, ultrasonic testing can accurately measure the thickness of the tank walls while the tank is still underground. Finally (still according to Sessions), Robbins's conclusion falsely suggests that tank lining somehow repudiates or voids the tank's UL label of approval.[8] The UL label indicates only that the tank in its original condition satisfied certain wall thickness specifications, and lining a used tank has no effect on its continuing ability to satisfy those requirements. Sessions later procured a letter from UL confirming this position. *See* E.R. at 309.

The district court concluded, however, that Robbins's statements were not deceptive, but "simply part of a reasoned argument." E.R. at 703. The district court said that "Joor may have been wrong, [but] it is clear that the WFCA could not have been misled by what Joor said." *Id.*

It is possible that the district court's conclusion was, for summary judgment purposes, erroneous. If Robbins were "wrong" in his letter, the Article 79 subcommittee may well have been misled. And there is evidence that it was. The minutes from the meeting at which the subcommittee voted to accept Joor's amendment reflect an acceptance of the erroneous idea described above: "The committee was unanimous in their disapproval of cutting an opening in a tank *and thus destroying the integrity of the UL approval* to proceed with the lining process." E.R. at 580 (emphasis added).

Misrepresentations, however, do not necessarily destroy *Noerr-Pennington* immunity. An antitrust plaintiff cannot summon the "sham" exception by alleging that defendant made misrepresentations when pursuing legislative—as opposed to adjudicative—action. *Clipper Exxpress*, 690 F.2d at

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8 UL—short for Underwriters Laboratories—is a private, nonprofit corporation that establishes standards and specifications for products in a wide variety of industries. The UL label on a product indicates that it meets the relevant standards. The parties agree, and the district court found, that UL approval "is essential to the successful marketing of a product." E.R. at 695.

1261; *see California Motor Transport*, 404 U.S. at 513; *First Am. Title Co. v. South Dakota Land Title Ass'n*, 714 F.2d 1439, 1447 (8th Cir. 1983), *cert. denied*, 464 U.S. 1042; *Metro Cable*, 516 F.2d at 228 (7th Cir. 1975).

Sessions, however, argues that the WFCA is not a legislative body. Perhaps so, but it was legislative action that both Sessions and Joor sought. Moreover, the WFCA was an indispensable part of the "political arena." *California Motor Transport*, 404 U.S. at 513. In *Noerr* the Court refused to hold that alleged misrepresentations in a publicity campaign designed to influence legislation were actionable under the Sherman Act. Such conduct fell "clearly into the category of political activity." 365 U.S. at 140-41. That principle controls this case.

Although the issue is a close one, we hold that that principle does not extend to Joor's alleged misrepresentations made *outside* the WFCA lobbying process, *before* the Code was amended, to local fire officials who thereafter denied Sessions the requisite permits for carrying on its work. The record suggests that these officials were induced to believe that tank lining would "void" the UL label or that tank lining was already prohibited by the Code. *See* E.R. at 232-33. In one case at least, Sessions claims to have evidence that it was Robbins himself who persuaded officials to deny Sessions a permit. *See* E.R. at 660.

Misrepresentations made to an executive official fall between the clear rules established in the legislative context (where misrepresentations are *not* actionable) and the adjudicative contest (where they *are* actionable). *See* P. Areeda & H. Hovenkamp, *Antitrust Law* 44 (Supp. 1986). Application of these distinctions is not easy. Executive officials may administer the law, adjudicate claims under the law, or, by framing policy, make law. The lines between the executive, legislative, and judicial function are often quite indistinct. Careful case-by-case analysis is necessary. Where the executive action sought was more a matter of *administering* than of *making* law, misrepresentations inducing the governmental decision will be actionable in antitrust despite the *Noerr-Pennington* doctrine. *C.f., e.g., Woods Exploration & Producing Co. v. Aluminum*

Co., 438 F.2d 1286, 1296-98 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) (misrepresentations before state natural gas commission inducing decision under set allocation formulae held unprotected by *Noerr*); *Outboard Marine Corp. v. Pezetel*, 474 F. Supp. 168, 178 (D. Del. 1979).[9]

Here, if Sessions's allegations are true, the fire officials were asked to respond in an administrative capacity. These officials were asked to deny Sessions its permit either because tank lining violated UL standards or because it violated the Code. This would be a clear instance of administering extant, established standards. We hold that these allegations state a limited "sham" exception claim. To succeed, Sessions must show that Joor's misrepresentations—and not any independent factors—caused the fire officials to act. In addition, it must prove all the other elements of a Sherman Act violation before it is entitled to antitrust damages.

The cause of action left to Sessions is a narrow one. Any misrepresentations made by Joor in pursuit of its legislative goals are fully protected under *Noerr-Pennington*. In addition, any injury to Sessions caused by the actual amendment to the Code—whether through governmental or private action in reliance thereon—provides no basis for an antitrust action against Joor. To this extent we fully affirm the summary judgment granted below. We reverse and remand only in order

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9 In *Noerr* itself, defendants had allegedly made misrepresentations to induce executive action. *See* 365 U.S. at 129-30. Defendants apparently sought an executive decision to enforce existing law *more strictly*. *See id.* at 131. That is the kind of policy decision our analysis would probably exclude from the reach of the "sham" exception. In any event, a more recent Supreme Court opinion has clearly established that a person's petitioning immunity does not protect him from at least some deliberate misrepresentations made in pursuit of executive action. *See McDonald v. Smith*, 472 U.S. 479, 484 (1984) (letter sent to president defaming plaintiff, a nominee for United States attorney, was not immunized by defendant's right of petition and was actionable in libel). Because such misrepresentations also fail to serve *Noerr*'s policy or statutory interests, we see no reason to immunize them in antitrust if they are not to be immune in libel. *See* Hurwitz, *supra* note 4 at 83-84; *see also McDonald*, 472 U.S. at 484 (citing antitrust precedent in support of its holding).

that Sessions be allowed to prove, if it can, injury caused by Joor's misrepresentations to fire officials in their administrative capacity.[10]

AFFIRMED in part; REVERSED and REMANDED in part.

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10 Sessions may of course also attempt to prove that Robbins made misrepresentations to *private* parties not in pursuit of its governmental aims, but rather to harm the tank lining industry directly. The antitrust actionability of such conduct—regardless of Robbins' position on the Article 79 subcommittee—was established in *American Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556 (1982). Sessions may also proceed with its state law claims, which were not involved in this appeal.

Supreme Court, U.S.
FILED
AUG 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-157

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALLIED TUBE & CONDUIT CORPORATION,

Petitioner,

vs.

INDIAN HEAD, INC.,

Respondent.

BRIEF OF THE STATE OF ILLINOIS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Printed by Authority of the State of Illinois (P.O. 33786—70—8-24-87)

QUESTION PRESENTED

Whether the petitioner's lobbying a model code organization can be held an actionable restraint of trade leading to treble damages under the Sherman Act, consistently with *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and its progeny.

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BRIEF OF THE STATE OF ILLINOIS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

As Amicus Curiae, the State of Illinois respectfully prays this Court grant the petition for a writ of certiorari submitted by the petitioner in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 817 F.2d 938 (1987). The oral opinion of the District Court is not reported. Both opinions are found in the Petition for a Writ of Certiorari, Appendices A and B.

IDENTITY AND INTEREST OF THE AMICUS

The State of Illinois respectfully submits this brief, as amicus curiae, in support of granting the writ of certiorari in this case. The Attorney General of Illinois is the chief law enforcement officer of the state. He is charged with the duty to enforce the state's antitrust laws, as well as the federal antitrust laws. Illinois has a significant interest in the correct interpretation and application by the lower federal courts of this Court's antitrust doctrine.

The Second Circuit's opinion below threatens to undermine the system by which states such as Illinois promulgate legislation in the areas of product safety and building construction. The opinion will make it more difficult for the states to fulfill their responsibilities to protect their citizens from unsafe products and from hazardous construction. As the question presented is of such practical significance to state government and its citizens, and as the decision's adverse impact on state regulatory interests is of such magnitude, Illinois respectfully requests this Court grant the petition for certiorari.

STATEMENT OF THE CASE

This case arises from the petitioner's efforts to block the respondent's proposal to include a new type of electrical conduit, known as PVC conduit, as a permissible type of electrical conduit in the 1981 edition of the National Electrical Code (NEC).

The NEC is a model code promulgated by the National Fire Protection Association (NFPA), which establishes products and performance requirements for electrical systems. The NEC is the most widely disseminated and adopted model code in the world. Forty-five states, including the District of Columbia, rely on the NEC in promulgating their electrical codes.

The NFPA is a private, voluntary organization composed of over 31,500 individual and group members representing industry, labor, academia, insurance, organized medicine, firefighters, and government. It revises the NEC every three years through a multi-step, several year long process. The NFPA submits proposed amendments to the NEC to a code-making panel made up of professionals with technical expertise in the area. If approved by this panel, the proposal then goes to the full membership, together with the comments and voting position of each panel member. After an opportunity for comment, the panel considers the amendment a second time along with the membership's comments. If again approved, the NFPA publishes the proposed amendment to the full membership. The entire membership then votes.

On September 18, 1978, the respondent began the process of obtaining NEC approval for its product, PVC conduit, by submitting its proposal to the NFPA.

The petitioner recognized that inclusion of PVC conduit in the NEC might adversely affect its sales of a competing type of steel conduit. It therefore met with a number of different groups, including other members of the steel industry, to gather votes in opposition to the respondent's proposal. The petitioner's lobbying tactics were aggressive, and included an NFPA membership and registration drive of its supporters, in an effort to "stack" the NFPA vote. When a vote was ultimately taken on the respondent's proposal, the proposal was rejected. Thereafter, various state legislatures enacted the NEC, and PVC conduit was not listed as a permissible construction material.

With its PVC product effectively excluded from the market, the respondent sued the petitioners for a violation of the Sherman Act in connection with its conduct before the NFPA. The jury found for the respondent and awarded it $3.8 million, to be trebled, plus attorneys' fees. The District Court granted the petitioner's motion to set aside the verdict primarily on the ground that its conduct in connection with the 1981 NEC was protected from antitrust liability under this Court's decision in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and its progeny. The Court of Appeals reversed and reinstated the jury verdict.

REASONS FOR GRANTING THE WRIT

The states have a responsibility to adopt laws, rules and regulations protecting the safety and welfare of their citizens. In exercising their regulatory and police power functions, states depend upon model codes such as the National Electric Code ("NEC") at issue in this case. Illinois requires compliance with the NEC in all cities, towns and communities except those which by ordinance have adopted comparable provisions. See, 41 Ill. Admin. Code, Part 100, Secs. 100.10, 100.210. Illinois has specifically delegated the power to establish building codes to local governmental units. See, Ill. Rev. Stats., ch. 24, par. 11-30-4 and ch. 34, par. 422. It is estimated that over fifty percent of all Illinois municipalities have adopted the NEC.

The decision below threatens to undermine the system of government reliance on model codes by denying concerned parties, which raise significant public safety issues before model code-making bodies, protection from treble damage liability under the Sherman Act as required by this Court's decision in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). In *Noerr* and in *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965) and *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), this Court developed the principle that the First Amendment right to petition the legislature outweighs antitrust concerns which arise when commercial competitors seek anticompetitive legislation. The opinion below disregards this principle. It will effectively chill the debate and hence will diminish the quality of the model codes considered by state and local government.

In addition to frustrating the states' ability to promulgate health and safety codes, and being inconsistent with this Court's decision in *Noerr*, the decision is in conflict with every other decision squarely treating the same issues.

1. The States Rely On Model Codes Such As The NEC.

In highly technical and complex areas, for example, safety codes and building regulations, state and local governments rely heavily upon a variety of model codes and other standards developed by voluntary organizations like the National Fire Protection Association ("NFPA"). *See* Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 Tex. L. Rev. 1329 (1978). State governments themselves lack the governmental resources to initiate, develop through public proceedings, adopt and defend comprehensive codes.

Development of such complex codes requires public hearings, which usually involve technical, scientific data and issues. Hearings are frequently time consuming, particularly when controversial matters may result in judicial challenges to adopted regulations. Furthermore, airing of the technical issues requires expert staff to conduct the hearings, analyze the evidence, weigh the sometimes conflicting data, prepare the appropriate code language and disseminate adequate information to those affected by the regulations in order to secure compliance.

As a practical matter most state and local governments lack the necessary resources to conduct their own investigations. For that reason and because the NFPA and other groups do a professional job in their own right, state legislatures depend on the NFPA and like code-making

associations to become, in effect, their committees and scientific laboratories. *See* Hamilton, *supra*, at 1377-78. From the state's perspective, code-making at the voluntary organization level is an integral part of its own legislative process. The model codes are the product of considered analysis and debate.

The NEC serves to illustrate how important model codes are to the states. Forty-five states, including the District of Columbia, rely on the NEC in promulgating their electrical codes. Aff. of John Lison, May 16, 1985, Joint Appendix, 137, 145 as submitted in the case below. Twenty-six states adopt the NEC in its entirety by reference. *Id.*_ *See, e.g.*, 41 Ill. Admin. Code Part 100, Sec. 100.210; 1981 N.Y Laws Chap. 707; Md. Ann. Code art. 38a, § 60; Colo. Rev. Stat. § 12-23-104(a). Another nineteen adopt it with amendments, usually modest ones. *Id. See, e.g.*, Cal. Admin. Code Tit. 24, R.3; 527 Code of Mass. Regs. 12.00; N.J. Admin. Code, Tit. 5, § 23; Wash. Admin. Code R. 296-46, R. 296-401. *See also* 29 C.F.R. § 1910.66(c)(22)(i) (1986); 33 C.F.R. § 183.435(a)(1) (1986) (federal regulations incorporating model codes by reference). Voluntary organizations perform an invaluable public service and save state and local governments precious legislative resources in developing model codes for government consideration. *See* House Select Comm. on Small Business, *The Effect Upon Small Business of Voluntary Industrial Standards*, H.R. Rep. No. 1981, 90th Cong. 2d Sess. 3, 75 (1968).

2. The Decision Below Will Stifle The Uninhibited Debate The Model Code Process Requires.

It is in the best interest of state and local governments that organizations such as the NFPA have access to a free flow of information, and conduct robust and vigor-

ous debate when creating model codes. The exchange of ideas—even "wrong" ones—is the crucible which shapes the final legislative product as it emerges from the model code-making group's processes. Often, a party in the best position to raise concerns about the safety of a product is a competitor. *See, e.g., Noerr*, 365 U.S. at 136-137. Challenges, such as those made by Allied against Carlon's PVC conduit on safety grounds, are precisely the sort of catalyst for investigation upon which the code-making process, and in turn the states, depend.

The imposition of antitrust liability in the circumstances of this case will inhibit free and open debate within model code organizations by those parties most capable and motivated to bring all the facts to the fore. Allied raised the issue of the safety of PVC conduit before the NFPA. While clearly Allied was motivated in part by commercial interest, the jury found as a matter of fact that Allied was also motivated by a genuine concern for safety. Furthermore, the objective validity of the safety issue raised by Allied was conceded at the trial by Carlon. If Allied's conduct is not protected, few will ever be safe. Parties simply will not risk antitrust litigation to oppose a competitor's product, even with strong arguments based upon bona fide, scientific evidence that a particular product is unsafe or otherwise hazardous.

The decision below thus goes to the very heart of model code-making and threatens to destroy the model code process. It will become a sham, with critics of a product afraid to speak up for fear of exposure to antitrust claims. Nor is it an answer that participants may move to the legislatures directly with their challenges. The legislatures are ill-equipped to assume the task of initiating and developing complex codes from scratch in technical areas without the assistance of model codes. See pages 3-4, *supra*. Taking over these functions would require staff increases at a time when most budgets are under considerable pressure. That simply will not happen.

Besides the practical difficulty of state governments conducting hearings or revising technical codes, the Second Circuit's opinion may bring other more far-reaching problems. As code-making breaks down, the relative uniformity of product safety legislation in the building area will tend to diminish. The result is likely to be unseemly and dangerous competition for building activity based upon how lax a code a local area is willing to accept in order to induce the work.

On the other hand, the additional burden of having to develop complex legislation without the benefit of prior code-making will tend to cause local governmental units to be more reticent about changing and updating codes to accommodate new products or necessary changes. Paradoxically, a Court of Appeals decision that ostensibly is intended to enhance competition may well do the exact opposite, in the long run perpetuating and entrenching existing products.

3. The Second Circuit Took An Erroneous View Of The Protection *Noerr* Accords To Those Participating In The Legislative Process Through Model Code-Making.

In *Noerr*, the Supreme Court recognized the critical importance of excluding from Sherman Act liability the activities of competitors seeking to influence the legislature. The right of petition is so precious and the benefits to the legislature of having input from all sources is so great, that parties seeking to participate in the process must not be shackled with treble-damage liability. As the Supreme Court stated:

> In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act.

365 U.S. at 137.

Even more fundamentally, the Supreme Court based its exemption from Sherman Act liability of those seeking legislative change upon the First Amendment rights of petition and association:

> The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.

Id. at 138. *See also California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1971) (application of the Sherman Act to petitioners of agencies and courts destructive of rights of association and petition). The Supreme Court has often recognized the exceeding importance of the First Amendment values of petition and association, and has frequently emphasized the exacting level of judicial review required of any legislation or lower court action which would impinge upon these rights, particularly as they relate to our democratic system.

> [T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process.

Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 294 (1981). The Sherman Act must not be turned into a weapon to inhibit groups or individuals from presenting the legislature with information relevant to its making a decision.

The Second Circuit in the decision below paid verbal obeisance to these principles, but went on to eviscerate them. The Court ruled that competitors bringing information before model code-making bodies exert only an "indirect" influence on the legislature, and therefore are not protected by the *Noerr* doctrine. Virtually ignoring the reality of the relationship between the states and model code-making bodies, the court found that Allied's conduct did not constitute petitioning of the government, and that there are effective methods for influencing state governments directly, rather than through the model code-making bodies.

From the state perspective of model codes as an integral part of the legislative process, the Second Circuit's distinction between "direct" and "indirect" pressure on the legislature is misconceived. Concerned parties attempting to influence model codes are participating directly in the legislative process. This is precisely the sort of political activity, implicating fundamental First Amendment concerns, which the Supreme Court ruled is entitled to protection from the application of the antitrust laws. As the Supreme Court stated in *Noerr*:

> The Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly.

365 U.S. at 136.

Indeed, the Court in *Noerr* extended protection to far more "indirect" lobbying activity than exists in this case. There, the defendant railroad associations engaged in a deceptive publicity campaign designed to destroy competitor truckers' good-will and to promote support for legislation inhibiting the truckers' ability to compete. *Id.* at 129-30. This activity was only indirectly aimed at the Congress. But the activities of concerned parties petitioning for change in model codes are, in every practical sense, aimed at the state and local legislatures which may adopt them.

Besides being unrealistic, the Second Circuit's opinion does violence to the First Amendment principles underlying *Noerr*. The opinion below insists that competitors may effectively lobby the state legislature directly. But as has been stated above, the states simply lack the resources adequately to consider all the various issues raised in the area of technical code-making. While states obviously can adopt, amend or reject the model codes promulgated by the code-making associations, as a practical matter they rely heavily upon the expertise of the code-making bodies themselves, and on a free flow of information being presented to them.

By inhibiting the free flow of information at the model code-making level, the Second Circuit's opinion effectively limits the information which will be received by the legislatures directly. The decision will effect the very evils that *Noerr* was intended to protect against: denying legislative access and the right of association to those with the most to say, and denying the legislature the benefit of the information and ideas that flow from the model-code process.

4. The Four District Courts To Have Considered These Issues Recognized The Reality Of State Government Reliance On Model Codes.

All four district courts to have considered these issues have concluded that petitioning model code associations is protected by the *Noerr* doctrine. In *Sessions Tank Lines, Inc. v. Joor Manufacturing, Inc.*, 1986-1 Trade Cas. (CCH) ¶66,989 (C.D. Cal. 1986), a company manufacturing fuel tank liners sued a company making fuel tanks, arguing that defendant Joor Manufacturing had undertaken a false information campaign to convince model code-making bodies to disallow tank liners. The association in this case was the Western Fire Chiefs Association, WFCA, which passes a uniform fire code, just as the NFPA passes the NEC. Also at issue was the defendant's influence in persuading Underwriters Laboratories ("U.L."), another model code organization, not to certify the safety of tank liners. The Court found that the challenged activity was protected under the *Noerr* doctrine because,

> [s]uch reliance upon the WFCA and UL by these governmental authorities in practical effect has resulted in a delegation of governmental authority to these otherwise private entities.
>
> . . . [A]s a practical matter, it would be virtually impossible for Joor to lobby the individual governmental entities regarding the adoption of particular specifications or requirements in the UFC. These governmental bodies rely on the WFCA and UL and in order to have any effective influence on the government entities, Joor was required to lobby the WFCA and UL.

Id. at 62,066.

Similarly, in *Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit Corp.*, 573 F. Supp. 833 (N.D. Ill. 1983), Allied Tube, the appellant in this case, sued Wheeling-Pittsburgh over Wheeling-Pittsburgh's attempt to lobby the NFPA to disapprove in the NEC a new type of conduit produced by Allied. The Court correctly recognized two key points. First, it noted the delegation of authority from state governments to model code groups:

> Such wholehearted reliance upon the NFPA and UL by these governmental entities has resulted in a near complete delegation of governmental authority to these otherwise private entities. While the governmental bodies of course have retained the power to modify or reject the NFPA and UL recommendations, in practice they have relied completely on them.

Id. at 838.

Second, the Court recognized the consequent difficulty of petitioning state government directly:

> as a practical matter it would be virtually impossible for WP to lobby the individual municipalities and states regarding the adoption of particular specifications or requirements for IMC. These governmental bodies have placed total trust and reliance on NFPA and UL. In order to influence effectively the governmental entities, WP had no option but to lobby NFPA and UL.

Id. at 838. *See also Indian Head, Inc. v. Allied Tube & Conduit Corp.*, No. 81 Civ. 6250 (S.D.N.Y. June 27, 1986) (Dist Ct. Opinion below); *Rush-Hampton Indus. v. Home Ventilating Inst.*, 419 F. Supp. 19 (M.D. Fla. 1976).

The State of Illinois wishes to reiterate the point that is made clear in each of these district court cases, and a point which was disregarded by the Court of Appeals

in the case below. As a practical matter, those wishing to affect legislation in technical areas such as building codes, have no choice but to petition at the model code-making level. Such is the system of mutual dependence that has evolved between state and local governments and the model code-making associations. Without this system, these governments would not be able fully to consider the merits of technical legislation.

CONCLUSION

The potential elimination of strong advocates with both the resources and capability to pursue safety issues within the model code development process, is contrary to the public interest. The very reason state and local governments rely so heavily upon such model codes, namely to facilitate the states' exercise of their sovereign authority to exclude unsafe products from the market, will be undermined. The decision below may, therefore, result in the public's serving as the unwitting and unwilling testing laboratory for unsafe products.

In its decision, The Second Circuit Court of Appeals placed major burdens upon the states, in regulating complicated scientific and technical areas, such as that regulated by the NEC. As this decision is contrary to the decisions of four previous District Courts, and as the question presented is of great practical significance to state and

local governments, the State of Illinois respectfully requests this Court to grant the petition for certiorari.

Respectfully submitted,

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August, 1987

No. 87-157

(5)

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALLIED TUBE & CONDUIT CORPORATION,

Petitioner,

vs.

INDIAN HEAD, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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94 pgs

PETITION FOR CERTIORARI FILED JULY 23, 1987
CERTIORARI GRANTED OCTOBER 5, 1987

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Relevant Docket Entries in District Court

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

81 Civ. 6250

INDIAN HEAD, INC.,
Plaintiff,

—v.—

ALLIED TUBE & CONDUIT CORPORATION,
Defendant.

Date	
October 9, 1981	Plaintiff Complaint
January 19, 1982	Defendant Allied Tube & Conduit Answer to the Complaint
April 26, 1985	. . . Trial concluded April 25, 1985, total trial days: 29, jury verdict for plaintiff in the amount of $3,800,000, decision reserved on defendant's motion for judgment notwithstanding the verdict
June 10, 1985	Filed order *nunc pro tunc*
July 31, 1986	Filed order granting defendant's motion for judgment notwithstanding the verdict and denying motion for new trial
August 6, 1986	Filed judgment entering judgment notwithstanding the verdict

September 2, 1986	Plaintiff Notice of Appeal from judgment notwithstanding the verdict
September 5, 1986	Defendant Notice of Cross-Appeal from Judgment denying motion for new trial
October 14, 1986	Filed Stipulation re: Exhibits

Relevant Docket Entries in Court of Appeals

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

86 Civ. 7734

INDIAN HEAD, INC.,

Plaintiff-Appellant,
Cross-Appellee,

—v.—

ALLIED TUBE & CONDUIT CORPORATION,

Defendant-Appellee,
Cross-Appellant.

Date	
April 22, 1987	Judgment notwithstanding verdict vacated and remanded with directions to reinstate the jury's Award
May 5, 1987	Order that Kramer, Levin, Nessen, Kamin & Frankel be substituted as attorneys of record for Defendant-Appellee, Cross-Appellant Allied Tube & Conduit Corporation
May 6, 1987	Allied Tube & Conduit Corporation petition for rehearing and suggestion for rehearing *en banc*
June 11, 1987	Order denying petition for rehearing and suggestion for rehearing *en banc*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 81 Civ. 6250 (PNL)

INDIAN HEAD INC.,

Plaintiff,

—v.—

ALLIED TUBE & CONDUIT CORPORATION and
NATIONAL FIRE PROTECTION ASSOCIATION,

Defendants.

COMPLAINT

Plaintiff Indian Head Inc., by its attorneys, brings this action against the defendants and complains as follows:

JURISDICTION AND VENUE

1. Jurisdiction is based upon 28 U.S.C. § 1337, this being a civil action arising under sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, for damages and injunctive relief for violation of section 1 of the Sherman Act, 15 U.S.C. § 1.

2. Venue is proper under sections 4 and 12 of the Clayton Act, 15 U.S.C. §§ 15, 22, all defendants being found or transacting business in this district.

PARTIES

3. Plaintiff Indian Head Inc. is a Delaware corporation and has its principal place of business in New York. Carlon is a division of Indian Head Inc. The Carlon Division (hereinafter "Carlon") manufactures and sells electrical non-metallic tubing, as hereinafter defined.

4. Defendant Allied Tube & Conduit Corporation (hereinafter "Allied") is a Delaware corporation and has its principal place of business in Illinois. Allied manufactures and sells electrical tubing, as hereinafter defined.

5. Defendant National Fire Protection Association (hereinafter "NFPA") is a Massachusetts corporation and has its principal place of business in Massachusetts. NFPA develops, publishes and disseminates recommended standards relating to fire prevention and safety. As more fully explained below, one such set of standards regularly promulgated by NFPA is the National Electrical Code.

NATURE OF INTERSTATE TRADE AND COMMERCE AFFECTED

6. The interstate trade and commerce which is the subject of this action and which is affected by the unlawful acts described herein is the manufacture and sale in the United States of tubing for use in above-ground electrical wiring in buildings (hereinafter "electrical tubing"). Carlon and defendant Allied sell electrical tubing in interstate commerce. Defendant NFPA also transacts business in interstate commerce.

7. Electrical tubing is used to contain and protect electrical wiring of various types, such as the wires which run throughout a building to supply electric power to overhead lights and wall outlets. Electrical tubing is available in various diameters depending on the size and quantity of electrical wiring required between any two points.

8. Most electrical tubing is sold by manufacturers, including defendant Allied, through sales agents or manufacturers' representatives who, on behalf of the manufacturers, solicit orders from distributors on a commission basis. The distributors, in turn, sell to electrical and construction contractors who install the tubing in conformance with applicable laws and electrical code requirements.

9. Traditionally, electrical tubing has been made of steel (hereinafter "steel tubing"). Defendant Allied manufactures and sells steel tubing.

10. Electrical tubing made of polyvinyl chloride, a plastic material (hereinafter "non-metallic tubing"), is the most recent generation of electrical tubing. Plaintiff Indian Head Inc., through Carlon, recently developed, and now manufactures and sells such tubing. Non-metallic tubing offers many advantages over steel tubing. Compared to steel tubing, non-metallic tubing is lighter in weight, easier to cut and is less likely to cause damage to wiring during installation. Moreover, Carlon's non-metallic tubing is corrugated—a very important feature which allows the installer to bend the tubing by hand, which cannot be done with steel tubing. As a result of the foregoing features, non-metallic tubing requires less installation time and is lower in over-all installed cost than steel tubing. In addition, unlike steel tubing, non-metallic tubing is virtually impervious to corrosion, and because it is non-conductive, it cannot become electrically energized or cause a short circuit if the conductors are damaged.

DESCRIPTION OF ANTICOMPETITIVE ACTS AND EFFECTS

11. Defendants have, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, unlawfully combined and conspired in unreasonable restraint of trade in the manufacture and sale of electrical tubing for use in above-ground electrical wiring in buildings.

12. Pursuant to this combination and conspiracy, defendants have unlawfully combined and conspired among themselves, and with other co-conspirators, to deny approval to non-metallic tubing in defendant NFPA's 1981 National Electrical Code (hereinafter "NEC"). By denying NEC approval to non-metallic tubing, defendants have effectuated a concerted boycott to exclude non-metallic tubing as a product competitive with steel tubing. As a result of the combination and

conspiracy, Carlon has been precluded from selling non-metallic tubing in almost the entire United States, and users of electrical tubing have been denied the advantages, including the cost-savings, of this product.

13. Defendant NFPA has sponsored the NEC since 1911. It has promulgated a revised edition of that Code every three years. The NEC prescribes standards for the safe design and use of electric conductors and equipment. As promulgated by defendant NFPA, a private corporation, the NEC is advisory and does not carry the force of law. However, the NEC has been widely adopted as a comprehensive, mandatory safety standard by governmental bodies exercising legal jurisdiction over electrical installations. Approximately 37 states have adopted the NEC in whole or in substantial part as their statewide electrical code. In those states which do not have statewide codes, the NEC has been wholly or substantially adopted by many of the larger municipalities. Thus, as a practical matter, any new product within the purview of the NEC must carry its approval in order effectively to compete and be sold in most parts of the nation.

14. The procedures followed by defendant NFPA for the promulgation of the 1981 NEC were essentially as follows:

Following the publication of the 1978 NEC, parties proposing additions or amendments to the NEC, for inclusion in the NEC to be promulgated three years later in 1981, submitted their proposals to the NFPA, which referred the proposals to its NEC Correlating Committee. The Correlating Committee assigned each proposal to the appropriate NFPA Code-Making Panel (hereinafter "CMP"). These CMP's are, in effect, committees of defendant NFPA to whom responsibility is delegated to determine the technical merits of each such proposal and recommend whether the proposal should be incorporated into the next NEC. There are currently 23 CMP's, each with expertise in a different technical area. Each CMP is responsible for evaluation of proposed articles and amendments in its respective field. The CMP's issued their final reports concern-

ing the 1981 NEC in early 1980. The reports were then processed by the NEC Correlating Committee, which published them several months prior to the 1980 NFPA Annual Meeting. The reports were then voted on by the membership at the 1980 NFPA Annual Meeting held in May, 1980. Those proposals approved at that meeting were thereafter incorporated into the 1981 NEC.

15. In September of 1978, Carlon began the procedure for obtaining approval of its non-metallic tubing in the 1981 NEC by submitting to defendant NFPA a proposed Code article designated as Article 331.

16. Carlon's proposed Article 331 was assigned to Code Making Panel No. 8 (hereinafter "CMP-8"), the Panel responsible for and with expertise in electrical tubing. From November, 1978 to December, 1979, Carlon provided various test reports and data to CMP-8, made presentations to it, and arranged several installation demonstrations of non-metallic tubing in various locations around the country to demonstrate the product to CMP-8 members. While CMP-8 initially did not accept Article 331, after it reviewed all the data, at its final meeting in December, 1979 concerning proposed provisions of the 1981 NEC, CMP-8 approved Article 331 by a vote of 11 to 4.

17. Beginning at least as early as the approval of non-metallic tubing by CMP-8, defendants, together with their co-conspirators, including the American Iron and Steel Institute, Republic Steel Corp., Triangle PWC, Inc., Western Tube Conduit and Corporation, Wheatland Tube Company, Inc., and others with a financial interest in excluding non-metallic tubing as a competitive product to steel tubing (hereinafter collectively "the steel group"), and other persons, combined and conspired to prevent competition from non-metallic tubing by excluding it from the 1981 NEC and future editions of the NEC.

18. In furtherance of the combination and conspiracy, defendants and the co-conspirators, including the steel group, brought about the rejection of Article 331 at the NFPA Annual Meeting on May 20, 1980, in Boston, Massachusetts by engaging in the following activities, among others, in furtherance of their combination and conspiracy to accomplish the anticompetitive purpose:

(a) Defendant Allied and its co-conspirators procured their employees, sales agents and others to become new members of defendant NFPA. Under then-current NFPA rules, anyone—a company or an individual—who became a member of NFPA within 30 days prior to the Annual Meeting could vote on all NEC proposals, including Article 331 covering non-metallic tubing.

(b) Defendant Allied and its co-conspirators paid or reimbursed, directly or indirectly, the NFPA dues of the new members.

(c) Defendant Allied and its co-conspirators arranged for those new members to be present at the NFPA Annual Meeting, and paid or reimbursed, directly or indirectly, expenses for travel, meals and lodging, and registrations at the meeting.

(d) Defendant Allied combined and conspired with its co-conspirators, including the steel group, the aforementioned new members that had been procured and with defendant NFPA, to engage in bloc voting against Article 331 at the NFPA Annual Meeting, without regard to the Article's technical merits.

19. In furtherance of the above-described combination and conspiracy, many people procured by defendant Allied and by the steel group attended the NFPA 1980 Annual Meeting for the purpose of voting as a bloc against Article 331 to prevent Carlon from introducing non-metallic tubing in competition with steel tubing. As a result of these many last-minute negative votes procured by defendant Allied and its co-conspirators, including the steel group, and accepted as valid votes by defendant NFPA, the 390 votes cast in favor of

Article 331 were insufficient to pass it, and the Article failed to win approval by the margin of 394 to 390. But for defendants' unlawful acts, and the arbitrary and capricious vote that they produced, Article 331 would have been approved for inclusion in the NEC by a large marjority.

20. Defendants further combined and conspired to prevent an accurate count of the vote, more than 90% of which was counted by means of people standing at their seats. The imprecise method of counting, the difficulty in determining whether those who were voting were in fact entitled to vote, the number of people in the auditorium and the conditions present at the time of the vote, including the movement of people in the auditorium, made it impossible to obtain an accurate count of the vote. In view of the foregoing and the minute margin, proponents of Article 331 sought either a recount or reconsideration. For example, Mr. Chester Schirmer, NFPA Second Vice Chairman and a member of the NFPA Board of Directors, stated:

> "It's a pretty close vote. I frankly feel that what is going on here is blatantly apparent to anyone in the room who has eyes, ears, and a nose. I, therefore, call for a recount."

Requests for a recount or reconsideration were denied by defendant NFPA.

21. Carlon appealed the vote within NFPA. The Board of Directors of defendant NFPA ignored the unfairness of the vote and denied Carlon's appeal.

22. Defendant NFPA had recognized before the rejection of Article 331 in May 1980 that, under its then existing rules and procedures, interests such as defendant Allied and the co-conspirators could combine and conspire to subvert defendant NFPA's consensual standards rules and procedures and thus prevent inclusion of a competitive product in the NEC. Nonetheless, defendant NFPA failed to modify its rules and procedures and participated in the above-described combination and

conspiracy which resulted in the exclusion of Article 331 from the 1981 NEC. Following the rejection of Article 331, defendant NFPA publicly acknowledged the inadequacy and potential for abuse and subversion of its rules and procedures, and also of the actual abuse and subversion of those rules and procedures, which resulted in the rejection of Article 331 at defendant NFPA's 1980 Annual Meeting. As announced in the December 1980 issue of "Fire News," the NFPA official newsletter:

> "In 1979, the NFPA Board of Directors established a subcommittee to study the issues of procedural requirements for standards adoption. Subsequent obvious 'block voting' at the 1980 annual meeting, and the negative reactions from a large section of the membership to such voting, reinforce the necessity for Board action on the situation."

Only after the rejection of Article 331 in May 1980 did the NFPA Board adopt several reforms which were direct responses to the unlawful methods used to prevent adoption of that Article:

(1) A membership vote against a proposed Code article would no longer be dispositive. If an article approved by the appropriate CMP and by the Correlating Committee were rejected by the membership at the Annual Meeting, the article would then go to the NFPA Standards Council for a decision on issuing the article.

(2) Voting at Annual Meetings would be restricted to those who had been members for 180 days, rather than only 30 days as had been permitted for voting at the 1980 Annual Meeting, when Article 331 was rejected.

23. Because defendants' combination and conspiracy had excluded non-metallic tubing from the 1981 NEC, Carlon sought a Temporary Interim Amendment (hereinafter "TIA") to the NEC. A TIA is an NFPA procedure whereby, under certain circumstances, new provisions can be added to the NEC prior to the next regularly scheduled triennial revision of

the NEC, which in this case would not be until 1984. To obtain a TIA, a three-quarters vote of the appropriate CMP is required initially, as distinguished from the simple majority required for approval for inclusion in the regularly promulgated triennial NEC.

24. Carlon's proposed TIA was also designated as Article 331, and was similar to the prior proposed Article 331, except that it provided for the use of other non-metallic materials in addition to PVC, if any proved suitable in the future. On June 30, 1980, as required under NFPA rules to begin processing of the TIA, a member of NFPA's CMP-8 registered his official endorsement of Article 331.

25. During the fall of 1980, Carlon made available further technical data concerning non-metallic tubing, both to the members of CMP-8 and to members of the public who were in a position to submit comments to that panel. Numerous comments by technically informed persons were filed in favor of the TIA sought by Carlon. Defendant Allied and its co-conspirators, including the steel group, meanwhile continued their combination and conspiracy to keep non-metallic tubing out of the market and procured comments against the TIA from many of the same persons whose votes they had procured at the May 1980 Annual Meeting. As Pete Schram, an NFPA staff member and Secretary to the Correlating Committee, stated in a memorandum transmitting some of those comments to CMP-8:

> "Attached hereto is a series of comments that are non-technical.
>
> "Our records reflect that this point of view [the opposition to Article 331] was represented at the Annual Meeting by Allied Tube and Conduit Corporation and by its employees and suppliers and is again being presented by these same individuals whose registrations at the Annual Meeting were provided by Allied Tube and Conduit Corporation."

26. On February 1, 1981, after considering the comments upon and the merits of non-metallic tubing, CMP-8 approved the TIA for Article 331 by a vote of 13 to 2. One of the only two dissenting votes to approval of Carlon's proposed Article 331 was cast by the representative of the co-conspirator American Iron & Steel Institute.

27. Shortly thereafter, defendant Allied and co-conspirator American Iron & Steel Institute moved to appeal the decision of CMP-8 to the NFPA Standards Council. That appeal was heard on April 1, 1981. The NFPA Standards Council also approved Carlon's proposed Article 331.

28. Defendant Allied and co-conspirator American Iron & Steel Institute appealed that decision to the NFPA Board of Directors. On May 27, 1981, the Board named a subcommittee of five members to consider the appeal, and scheduled it to be heard on June 17, 1981.

29. When representatives of Carlon appeared to argue the appeal, they learned for the first time that two members of the five-member subcommittee had been changed as a result of purported objections by defendant Allied, and that one other member of the subcommittee would not participate in the appeal. These substitutions, and the reduction in the size of the subcommittee to four members, were made without Carlon's advance knowledge or consent and denied it a reasonable opportunity to object to the change in membership and size of the subcommittee or to the designated replacements, and thus denied it a fair hearing. On June 22, 1981, Carlon was advised that the subcommittee had sustained the appeal of defendant Allied and co-conspirator American Iron & Steel Institute and determined not to issue the proposed TIA, thereby overturning the determination of both CMP-8 and the NFPA Standards Council.

30. By the above described combination and conspiracy, defendants engaged in a fundamentally unfair abuse and twisting of the NFPA consensual standards procedure for an anti-competitive purpose. Because of the adoption and application

of the NEC by states and municipalities as described in paragraph 13 above, the combination and conspiracy had and continues to have the following unlawful effects, among others:

(a) Carlon has been almost wholly excluded from selling non-metallic tubing in competition with steel tubing manufactured by defendant Allied and others of the co-conspirators.

(b) The distributors and contractors who would purchase and use non-metallic tubing have been subject to what is effectively a boycott of non-metallic tubing, which boycott was the purpose and result of defendants' combination and conspiracy.

(c) Contractors and owners and tenants of buildings have been denied the opportunity to benefit from the competition of non-metallic tubing with steel tubing, thereby maintaining and increasing the price of steel tubing.

31. As a result of the foregoing combination and conspiracy, and acts of defendants in furtherance thereof, Carlon has sustained injury to its business and property in an amount not yet ascertainable, but which will be measurable prior to trial.

32. The combination and conspiracy threatens Carlon with further loss and damage, because unless permanently enjoined, defendants will continue to prevent Carlon from obtaining a TIA to the 1981 NEC, and will prevent inclusion of an article permitting use of non-metallic tubing in the 1984 Code and subsequent Codes. Carlon has no adequate remedy at law.

WHEREFORE, Carlon prays for judgment:

1. Declaring that defendants have violated Section 1 of the Sherman Act, 15 U.S.C. § 1;

2. Awarding Carlon treble the damages sustained by it as a proximate result of the violations described in this Complaint, including costs and reasonable attorney's fees;

3. Permanently enjoining and restraining defendants from engaging in the violations described in this Complaint; and

4. Granting such other and further relief as this Court deems just and proper.

Dated: October 9, 1981

KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER

By /s/ JOSHUA F. GREENBERG
A member of the Firm

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Index No. 81 Civ. 6250

INDIAN HEAD, INC.,

Plaintiff,

—against—

ALLIED TUBE & CONDUIT CORPORATION and
NATIONAL FIRE PROTECTION ASSOCIATION,

Defendants.

ANSWER

Defendant Allied Tube & Conduit Corporation (hereinafter "Allied"), by its attorneys, Grand & Ostrow and Barrett, Hanna, Daly & Gasper, for its answer to the Complaint, herein:

1. Denies the allegations contained in paragraph 1 of the Complaint, except admits that plaintiff seeks to assert a claim and purports to invoke the jurisdiction of this Court as set forth therein.

2. Denies the allegations contained in paragraph 2 of the Complaint.

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 of the Complaint.

4. Admits the allegations in paragraph 4 of the Complaint, except denies that the Complaint accurately defines the products manufactured and sold by Allied.

5. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 5 of the Complaint, except admits the last two sentences of that paragraph.

6. Denies the allegations contained in paragraph 6 of the Complaint, except admits that it sells various products in interstate commerce, and denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in the last sentence of that paragraph.

7. Denies the allegations contained in paragraph 7 of the Complaint.

8. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 of the Complaint, except denies the allegations insofar as they purport to include or refer to Allied.

9. Denies the allegations contained in paragraph 9 of the Complaint, except admits that it sells various steel tubing and conduit products.

10. Denies the allegations contained in paragraphs 10, 11 and 12 of the Complaint.

11. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 13, 14, 15 and 16 of the Complaint.

12. Denies the allegations contained in paragraphs 17, 18, 19, 20 and 21 of the Complaint.

13. Denies the allegations contained in paragraph 22 of the Complaint, except denies knowledge or information sufficient to form a belief as to the truth of the allegations in that paragraph which purport to refer to defendant NFPA.

14. Denies the allegations contained in paragraph 23 of the Complaint, except denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in the last two sentences of that paragraph.

15. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 24 of the Complaint.

16. Denies the allegations contained in paragraph 25 of the Complaint.

17. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 26 of the Complaint, except denies the allegations in that paragraph insofar as they purport to allege a violation by Allied of the antitrust laws.

18. Admits the allegations contained in paragraphs 27 and 28 of the Complaint, except denies the allegations in those paragraphs insofar as they purport to allege a violation by Allied of the antitrust laws.

19. Denies the allegations contained in paragraphs 29, 30, 31 and 32 of the Complaint.

FIRST AFFIRMATIVE DEFENSE

20. The safety of the products manufactured and sold within the electrical industry is in large part regulated by voluntarily developed safety standards such as the National Electrical Code ("NEC"). It is the moral and legal responsibility of each manufacturer within that industry, in the development of such "voluntary safety standards," to address in the public forum and within the applicable organization the issue of whether products offered for sale to the public present a safety hazard.

21. It is only in recent years that the toxic effects on fire victims of gases from smoldering or burning plastics has been studied in any depth by the independent scientific community. In addition, there are now under way a number of programs

and studies which will make available even more specific information on the subject.

22. The information already available on the subject indicates that plastic commonly used in construction such as PVC electrical tubing and conduit creates serious hazards to people in fires.

23. In its activities relating to the NEC, Allied sought to make certain that the NFPA considered this issue of toxicity in connection with Article 331 as well other provisions of the NEC which permit the use of a variety of combustible materials.

24. It has been Allied's consistent position in its activities relating to the NEC, that until the current studies on toxicity are completed and the toxicity of all materials is fully considered and meaningfully addressed, the NFPA should not approve the use of additional PVC products.

25. All of Allied's actions and statements respecting its efforts regarding the 1981 NEC were based on a good faith, well founded belief that PVC products in fact constitute an inherent, immediate and substantial danger to the public.

SECOND AFFIRMATIVE DEFENSE

26. All actions taken by Allied with respect to the NEC and the proposed Article 331 constituted valid lobbying activity designed to influence a governmental or quasi-governmental body, which activity is, under the *Noerr-Pennington* doctrine, exempt from the federal antitrust laws.

THIRD AFFIRMATIVE DEFENSE

27. Section 1 of the Sherman Act, 15 U.S.C. § 1 is, as interpreted by plaintiff, violative of the First and Fourteenth Amendments of the Constitution of the United States.

FOURTH AFFIRMATIVE DEFENSE

28. All actions taken by Allied with respect to plaintiff's proposal to add Article 331 to the 1981 National Electrical Code were in accordance with the by-laws of the NFPA and the regulations governing committee projects and conformed to the standards and procedures established by the NFPA and its Board of Directors.

FIFTH AFFIRMATIVE DEFENSE

29. Upon information and belief, plaintiff, in attempting to obtain approval of Article 331, engaged in fundamentally unfair and deceptive activities designed to distort the NFPA's decision making process and to circumvent the NFPA's objective standards which must be met before a proposal can be incorporated into the NEC.

30. Upon information and belief the various tests, reports and data allegedly submitted by plaintiff to the NFPA and its committee and members and the various presentations and demonstrations made by plaintiff to the defendant NFPA and its committees and members were, with the full knowledge of plaintiff, inaccurate, incomplete and invalid.

31. Accordingly, plaintiff's claims are barred under the doctrines of *in pari delicto* and unclean hands.

SIXTH AFFIRMATIVE DEFENSE

32. To the extent that the facts and claims alleged by the plaintiff in the Complaint occurred at all, upon information and belief, plaintiff engaged in the same or similar conduct in connection with its efforts to obtain approval of Article 331. Accordingly, plaintiff's claims are barred under the doctrines of *in pari delicto* and unclean hands.

SEVENTH AFFIRMATIVE DEFENSE

33. To the extent that the facts and claims alleged by plaintiff in the Complaint occurred at all, they occurred with the full knowledge and consent of plaintiff.

34. Accordingly, plaintiff has waived its right to assert and is estopped from asserting any of the claims set forth in the Complaint.

EIGHTH AFFIRMATIVE DEFENSE

35. Plaintiff did not suffer damage in fact or injury to its business or property from any alleged conspiracy. Therefore plaintiff lacks standing to bring this action.

NINTH AFFIRMATIVE DEFENSE

36. The claims alleged in the Complaint are barred in whole or in part by laches or the applicable statute of limitations.

TENTH AFFIRMATIVE DEFENSE

37. Defendant Allied is not liable to plaintiff for the acts alleged in the Complaint because those acts are not the proximate cause of any injury to plaintiff.

ELEVENTH AFFIRMATIVE DEFENSE

38. The Complaint fails to state a claim upon which relief can be granted.

WHEREFORE, defendant Allied requests judgment dismissing the Complaint herein with prejudice, granting it its costs and expenses (including attorneys fees) incurred in this action, and for such other and further relief as the court may deem just in the circumstances.

Dated: New York, New York
January 18, 1982

GRAND & OSTROW

By /s/ [ILLEGIBLE]
A Member of the Firm
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and

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Attorneys for Defendant Allied Tube & Conduit Corporation

Question No. 1

Did Allied have a genuine belief as of May 1980 that electrical nonmetallic tubing ("ENMT") was unsafe?

Yes ✓ No ____

[Answer this question only if the answer to Question No. 1 is NO.]

Would it have been material to those attending and voting at the May 1980 NFPA meeting to have known that Allied did not genuinely believe that electrical nonmetallic tubing ("ENMT") was unsafe?

Yes ____ No ____

[Answer this question only if the answer to Question No. 1 is NO.]

Would it have been material to the NFPA Standards Council and to the NFPA Board of Directors to have known that Allied did not genuinely believe that electrical nonmetallic tubing ("ENMT") was unsafe?

Yes ____ No ____

Question No. 2

[Answer this question only if the answer to Question No. 1 is yes.]

In opposing Article 331 in May 1980, did Allied act, at least in part, based upon a genuine belief that ENMT was unsafe?

Yes ✓ No ____

Question No. 3

Was Allied genuinely attempting to influence the NFPA in opposing Article 331?

Yes ____ No ____

Question No. 4

Did Allied's conduct violate any of the rules or regulations of the NFPA??

Yes ____ No ✓

Question No. 5

Regardless of whether Allied's conduct violated any of the rules or regulations of the NFPA, did Allied's conduct subvert the consensus standard making process of the NFPA?

Yes ✓ No ____

Question No. 6

Under the NFPA rules and regulations in effect as of May 1980, did the vote of the membership at the annual meeting effectively determine whether Article 331 would be excluded from the NEC?

Yes ____ No ✓

Question No. 7

Were the NFPA rules and regulations fair in that they provided a full and effective appeal from the vote of the membership?

Yes ✓ No ____

Question No. 8

Did Allied's conduct deprive Carlon of full and effective access to the NFPA?

Yes ____ No ✓

Question No. 9

Was Allied's conduct a substantial or material factor in excluding Article 331 from the 1981 NEC?

Yes ✓ No ____

Question No. 10

Did Allied's opposition at the May 1980 NFPA meeting constitute the least restrictive means of effectively expressing Allied's opposition to the use of ENMT in the marketplace?

Yes ____ No ✓

Question No. 11

Did Allied's conduct in opposing Article 331 adversely impact competition?

Yes ✓ No ____

Question No. 12

Does Allied's conduct consitute an unreasonable restraint of trade in violation of the antitrust laws?

Yes ✓ No ____

/s/ [ILLEGIBLE]
4/9/85

[3258] for the last seven weeks.

THE COURT: All right, members of the jury, would you prefer that I go right into my instructions or would you like a short recess first? The instructions should not be terribly long, but if you want us to go into it now, I will.

(Pause)

THE COURT: I don't propose to repeat to you everything I told you about two weeks ago about the question on how you assess the credibility of witnesses and all the rest of that, I think I told you in great detail what factors you use, and I think those considerations are equally relevant to this phase of the trial, so everything I told you about credibility of witnesses and how you assess credibility, et cetera, and all of the other general instructions that I gave you I tell you now are fully applicable to this phase of the trial and, therefore, you should use those yardsticks.

I have given you what amounts to a special instruction earlier in the day with respect to the question of alleged treble damages insofar as it may affect the credibility or interest of any witnesses who testified about that phase of the trial and I think I have fully covered that, I don't think there is any need for me to repeat that charge to you.

I also tell you that the instructions that I **[3259]** gave you with respect to expert testimony, I think I made it very plain to you at the first phase of the trial, which is the liability phase of the trial, that the credibility of an expert witness is to be tested in the same way—is to be assessed in the same way that any other witness' credibility is assessed. You consider the same factors. You consider the interest factor.

And, of course, these experts who have testified on both sides here you have heard were paid for their time and their services and paid rather substantial amounts, so that is a fact you may consider in assessing the credibility of those witnesses. Their credibility, like any other witness, is for you to determine, and it is up to you to decide whether or not you believe

them or whether or not you accept the credibility of what they say.

I also told you at the first phase of the trial, of course, that the jury does not have to accept the testimony of any expert, that's a jury function. The jury assesses the expert's testimony and decides whether or not the reasons advanced for the expert opinion are sound in the mind of the jury.

I never like a jury to believe that they must be compelled to accept any expert's testimony because he is an expert. First, of course, there is the credibility question which I referred to and, second of all, you may **[3260]** not agree with the basis for the opinion he gives and you have to decide whether or not that opinion is sound or unsound.

We have had a series of experts testify at the damage phase of this trial and I think you can understand that both sides have made their arguments about whether or not the predicate for their opinions makes any sense in your mind.

You have heard arguments on the one side that they are speculative and not reasonable and you have heard arguments on the other side that the defendant's experts didn't know what they were doing. It is fairly within the jury's function to decide those questions.

So you assess the credibility of the experts, you assess the basis for their opinion and you decide whether or not the opinions you have heard are based upon a reasonable assessment of the facts and circumstances of the case. That is a proper jury function.

Now a word about damages. I think I have told you earlier in the case that the plaintiff is entitled to recover what amounts to compensatory damages only from the jury. Therefore, under the antitrust laws, that means a damage for a business injury suffered as a result of the alleged wrongful conduct of the defendant, and that has two parts, of course. The plaintiff must prove damages to his **[3261]** business as a result of the defendant's conduct and, of course, the second part of that is it must be the result of the defendant's conduct. It must have been caused by the defendant's conduct.

And I have instructed you on the question of proximate cause earlier in the trial. Suffice it to say, of course, as I have told you before, that under the law the defendant's conduct need not be the sole cause of the plaintiff's injury, but it must be a cause. It may operate in connection with other factors, but it must be a cause.

And when you deal with the quantification of plaintiff's damages, of course, the only damages the plaintiff is entitled to recover are those which result from the defendant's conduct, and I will say a little more about that in a second, but I want you to understand that that's what we are dealing with.

Now, it is not required under the law that the plaintiff prove his damages with mathematical certainty, but the plaintiff does have the burden of proving that he suffered a damage as a result of the defendant's conduct.

Now, I have given you instructions with respect to the preponderance of the evidence. Those instructions are equally applicable here. I have told you what preponderance is, I have told you and I will repeat it just briefly for you now, that preponderance does not mean the **[3262]** number of witnesses called so that you don't weigh numbers only, you look at the quality of the evidence.

And I have told you the party having the burden of proof has the burden of tipping the balance, as I have told you with that scale of justice, even slightly in his favor, but it must be tipped. If the scales are at equilibrium or tip in favor of the defendant, then, of course, the verdict must be against the party having the burden of proof, and the plaintiff, of course, has the burden of proof with respect to damages.

As I have told you, the plaintiff does not have to prove that his damages are established with mathematical precision or certainty, it is sufficient if he proves under the law in an approxiate amount what his damages are as a result of defendant's conduct.

Now, in a case such as this where a product has been excluded from the market, of course, to some extent there is a certain reconstruction process that must take place, because we don't know what would have happened had the product not

been approved—not been excluded, rather, from the code in 1980, so, therefore, in a case such as this where the plaintiff claims the defendant's conduct causes exclusion, of course, to some extent the defendant's conduct has made the quantification of exact damages difficult, so, therefore, the law is that it is sufficient **[3263]** if the plaintiff proves his damages to a reasonable approxirmation and, of course, the plaintiff does have the burden of proving a reasonable basis for the damages that the plaintiff claims.

So while the plaintiff need not prove his danages with mathematical exactitude, he must provide the jury with a reasonable basis on which to infer that the damages which he seeks are based upon the evidence in the case and a reasonable basis for claiming those damages. That is the plaintiff's burden and I think no one disputes that.

As part of that I should also tell you, of course, however, that the plaintiff may not prove his damages as a matter of speculation or conjecture or guesswork. There must be a reasonable basis for the damages that the plaintiff claimants. Plaintiff is not entitled to prove his damages by what amounts to speculation or conjecture.

Now, in the context of this case, of course, you may recall during the course of the trial we had some colloquy about the three story limitation and I think the plaintiff indicated to you at that time that they were withdrawing their claim for a damage calculation on the assumption that the three story limitation would not have been in existence from 1980 to 1984, from 1981 to 1984, so **[3264]** the only damage calculations which you are being asked to consider are those cases which you have seen on oral argument, here on closing argument which are predicated upon the assumption that the product would have been approved in the 1981 code with the three story limitation intact, so that's the only damages you are being asked to compute. The plaintiff is not seeking any damages based upon the assumption that between 1981 and 1984 the product would have been approved without the three story limitation.

The plaintiff has indicated to you and I think he has indicated to the Court in response to my question that they are presenting to you several alternative theories of damages, some of which as you have heard go beyond the year 1986, some of which end at the year 1986, but the longest of which I think goes to the year 1989, if I'm not incorrect.

MR. SACKS: That's correct, your Honor.

THE COURT: So there are several theories of damages which plaintiff offers and it is for you to decide whether or not the plaintiff has proved its right to recover, under the standards I have given you, damages on any one of those theories that he has relied upon.

Now, there is, of course, another thing which you have to keep in mind in the context of this case, and that is, of course, that the defendants are arguing here **[3265]** that there are a lot of other conditions out there in the market which impact plaintiff's ability to sell its product other than its defeat at the 1980 meeting, and I think the argument that has been made here—of course, you heard the plaintiff's argument most recently, and the plaintiff's argument is what happened in May 1980 has created a certain stigma on the product which has carried through and that the defendants have attempted to market that stigma in the years which have ensued so that the extent of the damages which it now suffered are as a direct resulted of what happened in 1980, and that is the plaintiff's claim. The plaintiff claims his damages do result from what happened in May 1980 and not from any conduct of the defendants that they were engaged in other than the marketing of that defeat in 1980 in the years that follow. That's the plaintiff's claim.

And, of course, the plaintiff has to prove that, as Mr. Wright told you, that his damages, the damages which he claims he suffered were the result of what happened in May 1980 and the defendant's efforts to market that.

Now, the defendant argues, of course, that the plaintiff's inability to sell the product result from a lot of other causes in the marketplace, such as plaintiff was not ready to proceed on

time in 1980 in any event, they lacked the proper management controls, their projections **[3266]** were unrealistic. There are a whole series of arguments the defendant makes in that regard. They argue that there was a genuine concern for safety and a legitimate safety question out there in the marketplace which impacted the plaintiff's sales in that regard. And, of course, these are factors you may properly consider.

The plaintiff does not seek damages resulting from any of the defendant's conduct other than its conduct at the May 1980 meeting and its marketing of that defeat in the marketplace.

To the extent that the defendant has sought to bring to the public's attention safety questions, to the extent the defendant has sought to legislate—to lobby before legislative bodies or political bodies with respect to the safety question, the plaintiff does not claim any damages from that conduct, and such conduct may not be a proper predicate for you to assess any damages because that type of conduct would be protected and is not a violation of the antitrust laws. The defendants are entitled to take whatever measures they want to take to inform the public or the political bodies involved of their concerns about the safety issues and the plaintiffs do not seek any damages as a result of that conduct.

So the ultimate test for you to decide is, did the plaintiff's damages or do the damages of the plaintiff **[3267]** which they claim they suffered result from what happened in 1980 and the defendant's efforts since 1980 to rely upon that or utilize that factor in the marketplace. Those damages are properly recoverable and you may properly consider that testimony for that purpose.

You should understand that the purpose of awarding damages in any civil action, of course, is to put the plaintiff in as good a position as he could be placed as if the unlawful conduct had not occurred, and that's the purpose of compensatory damages.

I have told you before and I repeat again, you are not to concern yourselves with punishing the defendant. Punitive damages are not a proper item for the jury to be concerned with. The only damages which the antitrust laws permit are

compensatory damages which are those designed to make the plaintiff whole, to put them in as good a position as they would be if the defendant had not committed the violations of law which the plaintiffs say they committed.

You should understand in arriving at your damage computations or in arriving at a figure with respect to damages, first of all, the fact that I instruct you on damages should not be taken as any indication on my part that you should find any damages whatsoever. It is up to you to decide whether the plaintiff has proved its case and has carried its burden of proof on the damage question.

[3268] So I don't suggest one way or the other how you should find with respect to the damage claim or what amount you should find, but I do tell you that in arriving at that determination, of course, you may not do it by improper means.

I mean, I have told you before what your deliberative process requires as a jury and that you are required to talk to one another and to listen to each other's arguments in that regard and to consider all the evidence in the case and that you are not to compromise your individual judgment improperly, although you are required to—I don't think I have to repeat all that, I have said that to you before and if you want to hear that instruction again I can give it to you, have it read back to you, but I think you remember what I said, that it is your oath as a juror to go into the jury room and to listen to your fellow jurors and to deliberate and to surrender an opinion if you think it's wrong, but if you don't think it's wrong you are not to surrender an opinion because of compromise or any other improper reason.

And in going about the damage calculations, of course, it would be manifestly improper for you to arrive at that number by some form of improper compromise. You have to decide, all six of you must agree as to what the damage calculations are and, therefore, you must do that in **[3269]** the same way in which you resolve all of the questions that were put to you at the liability phase of the trial, through honest debate and open exchange of ideas and a fair attempt to arrive at a unanimous

opinion as to what the damages are or should be in this case, and that's up to you to decide.

You are not to arrive at that number by improper means, such as all of you get together and take a bunch of numbers and average them out. That would be improper. You all have to make a good faith assessment of the numbers. You have to agree upon what the damages are and you cannot do it by compromise or some other improper means.

In deciding what the question of damages are, of course, we are talking about profits, and to the extent that projected sales are relevant to profits, of course, you may consider that sales figure or those projected sales figures as relevant in deciding what the lost profits are, but, of course, the only damage that the law recognizes, of course, is lost profits.

And there may be, of course, lost past profits for the years up to the present time and lost future profits for the years in the future. As I have told you, the plaintiff's calculations include estimates up to the year 1989, some end at the year 1986, so the plaintiff has a claim for past lost profits and a claim for future lost **[3270]** profits, and whether or not they have carried the burden on that is for you to decide.

I will tell you as the plaintiff's counsel did tell you during the course of his closing argument that with respect to any claims for future profits or lost future profits, of course, as you must all be aware, if you get money now, it is worth more than getting money a year from now in the sense that you have the money presently to invest and, therefore, there must be a discount factor with respect to any funds you award now for future profits over the next several years, and the parties have agreed that that discount factor should be five percent for the first year of future profits, which I think is 1986, and if you decide the damages go beyond 1986, that is 1987, of course, that will be five percent times two years, which will be ten percent, and 1988 would be 15 and 1989 would be 20 percent.

I don't think they have to apply a discount factor of more than 20 percent for any future year because that is the last year on any theory of your projections as it goes forward in the future.

MR. SACKS: That's right.

THE COURT: The jury should know the parties have agreed on a discount rate of five percent per year and that has to be multiplied as I have indicated to you.

[3271] Well, I think I have concluded what I intend to say. Unless there are any additions to the charge, I think I covered most of the things you wanted me to tell the jury.

Anything further which you think I should cover?

MR. YERMAN: If I may, your Honor, just to avoid any possible confusion on exactly which damage theories the jury ought to be looking at in terms of the documents, I have written on a piece of paper the exhibit numbers of the three current cases and I can read them or we can even just give this piece of paper to the jury.

THE COURT: I take it—are there three exhibit numbers?

MR. YERMAN: There are three exhibit numbers and one summary number.

THE COURT: I will allow you to read that into the record if you want so the jury will have easier access.

MR. SACKS: In addition to that, it is in the second book, the smaller of the two books.

THE COURT: Both sides I take it have given the jury documents which are relevant to the damages and if you want to identify particularly for the jury what documents you want them to look at, I will let you both do that now.

MR. YERMAN: All right. I am not really trying to focus on particular damage documents, but these are the computation numbers. It was the smaller books headed **[3272]** plaintiff's damage exhibits cross examination and it is the second book that we gave to the jury.

The three cases we are referring to are case number 4, which is PX 528, that is the Carlon case; revised case number 2, which is PX 659, which is the Allied case; and revised case number 5, which is PX 660, the Republic case.

PX 528, PX 659 and PX 660 are the three cases and the summary is PX 661.

THE COURT: All right. I have no objection to giving the jury a list of those exhibits if they want to see them.

Mr. Wright, is there anything you want to tell the jury?

MR. WRIGHT: I think I have said everything I want to say.

THE COURT: All right.

THE COURT: We have a verdict form here.

MR. WRIGHT: They have all the books, if that's the question. I think they have everything in the jury room.

THE COURT: We have a verdict form which asks you to determine what amount of profits did Carlon lose as a proximate result of Allied's unreasonable restraint of trade in violation of the antitrust laws, and that just **[3273]** asks you to quantify the total amount of damages, and that includes damages for lost profits that you find may have occurred and future profits, of course, with a discounting factor which I mentioned.

The parties have asked for one lump figure on that so there is no need to itemize that figure, but as I told you, you arrive at that by a fair evaluation of all the evidence in the case and with due regard to all of the arguments that have been made by both sides on the issues which impact upon the damage calculation.

You have heard the arguments, I don't intend to repeat them. To some extent they really boil down to an argument on Mr. Wright's part that the plaintiff's damages are basically speculative and not reasonably based, and the plaintiff's argument which is that, of course, they are based upon reasonable bases, including what Allied thought would happened. You heard the arguments, I don't have to repeat them. I think the case is ready for you to decide.

If there is nothing further you want me to tell the jury, I will ask them to deliberate and excuse the alternates.

MR. WRIGHT: I have one point for the record.

THE COURT: You can do it here up at the box if you want, if it is done quickly.

MR. WRIGHT: Yes.

What amount of profits did Carlon lose as a proximate result of Allied's unreasonable restraint of trade in violation of the antitrust laws?

$3,800,000.00
Three Million Eight Hundred thousand dollars

Dated: April 25, 1985

/s/ [Illegible]
Foreperson of the Jury

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 Civ. 6250

New York, N.Y., June 27, 1986, 11:50 a.m.

INDIAN HEAD, INC.,
Plaintiff,

—against—

ALLIED TUBE & CONDUIT CORP., etc.,
Defendant.

Before:

HON. JOHN E. SPRIZZO,
District Judge.

APPEARANCES:

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
Attorneys for Plaintiff

By: Fredric W. Yerman, Esq.
Ira S. Sacks, Esq.

GRAND & OSTROW
Attorneys for Defendant

By: Frank Wright, Esq.
Allison Manning, Esq.

[2] THE COURT: It is your motion, Mr. Wright, so I guess you go first. Why don't you confine yourself to the Noerr-Pennington question, because I have considered all of the other applications in your brief and I am satisfied that none of them have any merit.

With respect to your arguments as to the charge, those are, in my view, not meritorious. Concerning your arguments addressed to the insufficiency or inconsistency of the jury's answers to the questions, I think the jury's answers are not irreconcilable. I think you can subvert the spirit of the NFPA rules and have an effective appeal at the same time. I don't find those arguments to be meritorious.

Address yourself to the Noerr-Pennington question, which I think is the only issue.

MR. WRIGHT: Very good, your Honor.

It seems to me, in reviewing the record in this case and the long history we had as it relates to Noerr-Pennington, the reason we had a trial in this case is because there was a concern, a question, as to whether or not the position we asserted during the course of the 1981 National Electrical Code session was genuine. As your Honor will recall, your Honor described at one point the match point, that every case has a match point. As your Honor described it, the match point in this case was **[3]** whether or not, when we stood up and railed against the safety concerns of that product, we were trying to fool somebody, trying to defraud somebody, because in fact we may have been intending to go in that business ourselves.

Those arguments were made and that long trial was had to resolve that question, in my judgment. The jury found in our favor. The jury found in our favor on all of the factual questions that relate to the Noerr-Pennington defense.

THE COURT: Except for one, which is the jury's finding that you subverted the spirit or the rule or the letter, whatever it was, I forget. I will get the jury question in front of me.

MR. WRIGHT: The jury question, I think, your Honor, was whether or not our conduct at the meeting subverted the—

THE COURT: The consensus-making-standard process.

MR. WRIGHT: We will deal with that, your Honor, because I expected that I would face that.

THE COURT: I don't know that that is more relevant to the rule-of-reason question than Noerr-Pennington, but it may have incidental impact on both.

MR. WRIGHT: As your Honor will recall, during the entire course of this case and even during the course **[4]** of dealing with the jury, it was your Honor's conception that that particular question dealt solely with the question of whether or not our conduct was reasonable or unreasonable. But I will put that aside for a moment. Let me deal first with the legal questions that I think your Honor has to deal with.

The first question is whether or not Noerr-Pennington applies to an organization like the National Fire Protection Association. It has been the plaintiff's consistent position in this case that Noerr-Pennington is limited to direct lobbying activities with a legislature or direct applications to government officials or govermment administrative agencies for relief. It has been our position, and it has been the holding of every court that has considered that question—that is, the extent to which Noerr-Pennington may be applied to private standards-making organizations—that the test that must be applied is to look at a relationship between the activities of the standards-making organization, what they do, and the ultimate legislative effect.

In this case there has never been a dispute that there is a direct, immediate relationship between what the National Fire Protection Association does in promulgating the National Electrical Code and the ultimate legislative effect. That results from the adoption by reference, the **[5]** incorporation by reference, in numerous—numerous—the majority of state and local jurisdictions in this country, of the model code enacted by the National Fire Protection Association.

THE COURT: Their only argument as to that is that you get two cracks at it, because if you lose at the NFPA level, you can still succeed at the legislative level.

MR. WRIGHT: To the extent that is an observation, it is an observation that makes no sense to me, because if Noerr-Pennington protects you during the course of your efforts to affect or influence the legislative process, it makes no sense to me and there is nothing in Noerr, and there is nothing in any of the opinions that ever addressed it, that Noerr is limited to one particular stage in the process.

THE COURT: The only case that comes close to saying it is the Mohammad case out of the Fifth Circuit.

MR. WRIGHT: The Mohammad case, your Honor, really doesn't say that, it really doesn't say that.

THE COURT: It comes close to it in the sense that it suggests that this doctors committee was not a government agency, and the BOME did not have to follow their recommendations. So there is at least an argument that you have to be directly at that level before you are protected by Noerr-Pennington. I don't know that I agree **[6]** with it, but that is what the case seems to say.

MR. WRIGHT: In any event, your Honor, even more pointed than the undisputed relationship between what the NFPA does and the ultimate legislative effect is the theory of their case. The theory of their case has always been that they were injured in the marketplace, that they were barred from introducing this product into the marketplace, not because of what happened at the NFPA meeting but rather because as a result of that meeting local and state jurisdictions adopted pieces of legislation, administrative regulations, which prevented them from selling their product in the marketplace. The obstruction and the restraint to their entry into the marketplace is and always has been legislation, government action.

It is on that basis that Judge Hart in the Wheeling-Pitt case, and indeed every other case that has considered this question, has said in effect that you can't have it both ways. You can't come into federal court and say, "I have been damaged, I am excluded from the marketplace because there are federal and state and local laws that prevent me from selling my product,"

and at the same time say that efforts to influence that process, no matter how indirect, no matter how remote from the ultimate effect, are not covered by Noerr-Pennington. Noerr dealt directly with the question of whether or not indirect **[7]** efforts not directed explicitly at the legislature were covered by the Protection of Noerr. It concerned the extent to which Noerr should be extended to what amounted to an effort to create a groundswell of public opinion. Third-party practices, I think, was the phrase that Justice Black used. He said unequivocally that Noerr has to apply to the process at each stage of the process. In fact, I think it is probably conceded, must be conceded, that the most important stage in the legislative process is the activities at the National Fire Protection Association, as it is at that point—

THE COURT: Their argument is that Noerr protects advocacy, and this is misconduct because you stacked the meetings and all the rest of that.

MR. WRIGHT: That again ignores the realities of the political process. There is nothing in the First Amendment right to petition that limits the petitioner to standing up by himself—by himself—to say his piece. The right to petition, if it means anything, must include the right to organize with people who are of like mind, the right to put together the most powerful voice you can to effect—to effect—the end that you want to achieve.

Voting is the essence of the political process in our country. The cases that they have cited, the O'Brien case and all the cases that deal with the **[8]** limitation of the First Amendment to affect statutes which prohibit certain types of conduct, are not apt here. There are statutes that prohibit discrimination, there are statutes which prohibit draft-card burning. And it is correct that the—

THE COURT: Secondary picketing, that sort of thing.

MR. WRIGHT: Secondary picketing. You can't go before the Court and say, "What I was endeavoring to do when I burned my draft card was express a point of view." And there is an

existing statute which says you cannot do that. That is not what this case is all about. This case concerns the construction of the very statute, the Sherman Act, that is—

THE COURT: You are saying, I take it, their argument is a bit circular in the sense that they start from the assumption that conduct which is otherwise illegal is not protected because it is part of speech, whereas you say the issue to be resolved here is whether the conduct is illegal in the first place.

MR. WRIGHT: Precisely right, your Honor. The issue before the house is whether or not the Sherman Act was intended to apply to this type of activity. I just don't think those cases are apt.

THE COURT: I think there is a circularity in **[9]** their argument, but I will let them address themselves to that.

MR. WRIGHT: There are a number of points that they make in their brief, your Honor. One of them was that Noerr was intended to apply only when, as I indicated before, the lobbying activity is directed specifically at government officials, and they say that since the NFPA is not comprised of government officials, that therefore Noerr does not apply here.

THE COURT: That is an awfully hard argument to sustain in view of the facts of Noerr itself.

MR. WRIGHT: I must say, Judge, that is precisely what I was going to say.

THE COURT: Because in Noerr it was obvious that they were doing a lot of activity directed to other people, other people in the public, etc.

MR. WRIGHT: The other part of the difficulty with that argument, your Honor, is that it would mean that in the context of standards-making organizations the result would be that in fact Noerr cannot apply, because standards-making activities are by definition comprised of industry personnel. That is why they exist. That is the utility of the organizations that they bring to bear—

THE COURT: Somebody cited the Hydrolevel case, and I read that case again last night. I didn't see why it **[10]** has anything to do with anything, because Noerr-Pennington was never raised, as I read the case.

MR. WRIGHT: Beyond the point that Noerr-Pennington was never raised in that case, I have my own view as to why it wasn't raised, and my view is that—

THE COURT: Did any of the parties raise it?

MR. WRIGHT: I don't think so, your Honor. I think what they decided to do in that case, your Honor, as a matter of fact was concede liability and only go to trial on the question of the agency.

THE COURT: Maybe that is what happened, and maybe some lawyers should be sued for malpractice, but I am not so sure that Noerr-Pennington wouldn't apply.

MR. WRIGHT: The organization itself, the individuals who participated in the conduct in question, did not go to trial. They settled, is my recollection of the case. I don't think there is any doubt in that case, since it involved, not the formulation of a standard, but rather what amounted to a fraudulent interpretation of a standard by an individual who had a conflict of interest—

THE COURT: You would probably argue that was closer to an adjudicatory situation and therefore the sham exception has wider berth.

MR. WRIGHT: Absolutely. And if the sham exception has any meaning, it has application in that case **[11]** where what happened is as gross a fraud as anyone could imagine.

THE COURT: Sort of like a judge on the payroll.

MR. WRIGHT: That is exactly what that was. That is precisely what that was.

So I don't think that it is possible, in the context of standards making, to limit the application of Noerr to a situation where only government officials are involved in the

process. You would have to sit down and examine, for example, at what stage during the process government officials may have been involved. In fact, during the course of the voting session there were a lot of government officials there. There is a whole electrical inspectors section in the National Fire Protection Association, all of which participated very actively in that voting session. So there were a number of voting officials there.

THE COURT: Their argument essentially is, as I understand it, that the conduct is so egregious as to take you out of Noerr-Pennington. Even if you might not be out of Noerr-Pennington at the Congressional level itself, you are out of it at the standards-making process, because some lesser standard of misconduct might suffice to take you out of Noerr-Pennington. It is indirect rather than direct. I think that is the argument they are making in their **[12]** briefs.

MR. WRIGHT: To the extent that they have now, it seems to me, said that block voting is sham—

THE COURT: I don't think there is any question that block voting and getting out the vote and lobbying the Congress would certainly not be unprotected conduct at the Congressional level. I don't think anybody can argue that it is part of the legislative process. The argument has to be obliquely that somehow this conduct which would be otherwise tolerable at the Congressional level becomes intolerable or illegal at the standards-making level. I assume that is what the argument has to be.

MR. WRIGHT: My response to that is—and it is kind of a funny response—there is nothing wrong with it. The answer to that is, the plain answer to that is, what happened here cannot rise to the level of the type of misconduct that has traditionally been recognize as sham conduct. If we are concerned with the application of the sham exception to this case, I think we should all thank the senior partner of Kaye, Scholer for the fine law review article he wrote on the subject.

THE COURT: He didn't help them.

MR. WRIGHT: He didn't help them. His exception was a very narrow amendment. The exceptions to the right have to be very narrowly construed.

[13] THE COURT: His view seems to be that all you is need is a genuine intention to influence legislative action, period.

MR. WRIGHT: And to the extent that that is the test—

THE COURT: Or any other government action.

MR. WRIGHT: To the extent that that is the test, we all considered whether or not we would even submit a jury question on that, and we all agreed that jury question made no sense, because there is no doubt that what Allied was endeavoring to do was to affect the outcome. That was the reason they were there, the very reason they were participating. The very thing we were accused of as wrongdoing: the effort to affect the outcome.

THE COURT: I would assume that what Professor Handler was saying in his article was that I went a lot further than I had to go and probably a lot further than I should have gone in having a trial at all.

MR. WRIGHT: No, sir. No, sir.

THE COURT: He seems to say I should have granted summary judgment.

MR. WRIGHT: But the reality is, and I will concede this, I believe that if you were going to characterize the nature of the National Fire Protection Association and the formulation of the National Electric **[14]** Code, I would say that it is a quasi-legislative activity. As Professor Handler would say, to the extent it is quasi-legislative it is entitled to the same analysis of sham as you would receive in the legislature.

Beyond that, however, because no one is quite prepared to say that this is quasi-legislative, assuming—assuming—that it is quasi-administrative in some sense, the formulations of sham are, as your Honor indicated, whether or not you are

legitimately attempting to affect the outcome or whether or not you have invoked the process simply as a means of injuring your competitor by embroiling him in repetitious, baseless claims which are expensive, which are tedious, and it is that very invocation of the process, without good faith, without valid—

THE COURT: I think it goes further than that. I think he would say that the sham exceptions are to be limited to those cases in which there is no genuine intent to influence governmental action.

MR. WRIGHT: Period.

THE COURT: Period.

MR. WRIGHT: To the extent that that is a correct formulation—and I think it is—there is no question that plaintiff has conceded that this cannot be sham conduct. That very issue was taken away from the jury.

THE COURT: There is no doubt that they have **[15]** conceded that there is a factual basis for a concern for safety.

MR. WRIGHT: There is no question about that, and I suppose that gets to the next question.

THE COURT: Which would be evidence that would lead to the conclusion that you had no genuine intent. At least the Second Circuit in the Litton case seems to suggest that the lack of a factual basis for your position is some evidence that you did not genuinely intend to influence legislative action.

MR. WRIGHT: In the Wheeling-Pitt case, Judge Hart said that the best indication that in that case Wheeling-Pitt genuinely intended to affect the outcome was, number one, that the objections that they were asserting had a scientific basis, and number two, that the organization in question in that case, UL, in fact accepted them. And that is what happened here. That is exactly what happened here. The only other formulation of sham, the only other issue in sham—and here again Justice Black would say that fraud, bribery and the like don't

even constitute sham in the legislative sphere, assuming for the moment that—

THE COURT: I would have trouble regarding bribery of a Congressman as protected by Noerr-Pennington. I don't think the courts would ever go that far if they **[16]** were presented with that issue.

MR. WRIGHT: Milton Handler would say that the plaintiff is not without a remedy but the remedy is not the Sherman Act. That is the response to that question.

THE COURT: Notwithstanding the distinction drawn between the legislative and the adjudicatory process, if the Supreme Court were presented with a case where a group of competitors schemed to bribe a majority of the Congress to get legislation, I have a feeling they would not find that protected by Noerr-Pennington.

MR. WRIGHT: Thank God that is not this case. This case involved only, in the context of sham, a question as to whether or not what we were asserting was valid, what we were asserting was something that we truly believed.

Whether or not bringing 150 people to a meeting rises to the level of such misconduct as to come within the sham exception, I suppose is the question that your Honor is going to have to deal with. Other than to say that such a holding would run contrary to every conception and every articulation of sham that has occurred in the cases to date, and other than to say that when you are following the rules, not engaging in conduct which in any sense could be construed as malum in se, criminal, tortious, in any way prohibited by any accepted code of conduct in the political process, going out and bringing a lot of people in and **[17]** having them vote the way you want them to vote is not only not unacceptable conduct, it is the way it works. That is precisely the way it works. So to label that—

THE COURT: It is the problem I have had with this case from the beginning.

MR. WRIGHT: Pardon me?

THE COURT: It is the problem I have had with this case from the beginning. In every club I have ever belonged to, some of that went on.

MR. WRIGHT: The jury finding that that conduct in some way subverted the process does not, your Honor, alleviate the Court's responsibility to make a judgment as to whether the facts as they existed—

THE COURT: As to the jury's finding, which is why I reject your arguments with respect to the inconsistency of the answers to the questions to the jury, I think you could comply with all the rules and still subvert the standards-making process within the limits of the testimony the jury heard from your expert—I think it was your expert.

MR. WRIGHT: Our expert, I am prepared to deal with that.

THE COURT: No, no, I am just saying I think the subversion of the process would have some very substantial relevance to the question of whether or not the standards-**[18]**making process is undermined for purposes of a rule-of-reason analysis so that you could no longer rely upon the pro-competitive aspects of standards setting as opposed to the anticompetitive aspects. I am not sure it has a lot of relevance in the context of Noerr-Pennington.

MR. WRIGHT: I think we would be faced with a situation where conduct which is classically political, conduct which is conceded to be a part of the political process for the purpose of achieving a legislative end, is somehow deemed to be not within the protection of a doctrine which is designed to protect the invocation and participation—

THE COURT: What I am saying is, to the extent that you argue that standards are pro-competitive, a subversion of the standards-making process would have some impact upon your pro-competitive versus your anticompetitive argument, as your expert testified. I don't know that it necessarily would require a finding that it is not protected by Noerr-Pennington.

MR. WRIGHT: As your Honor indicated, I will not deal with the question of reasonable or unreasonable, because your Honor seems to—

THE COURT: I think my charge on that was fair. Your arguments with respect to the way I put that issue to the jury in the least-restrictive-means analysis, and all **[19]** of that, I don't think fairly characterize what actually happened in the court. I think the charge was fair on that issue. I think your exceptions in that regard are without merit. To the extent that you argue there was a factual insufficiency for the jury's finding of least restrictive means and the role that I gave that in my charge, their arguments are more persuasive than yours. All I am saying is that it doesn't follow that because you subverted the spirit of the standards-making process, so to speak, as the jury so found, that it necessarily follows that you are not protected by Noerr-Pennington unless you subverted it in a way that Noerr-Pennington and the sham exception would make unprotected. That is all.

MR. WRIGHT: And it is our basic position that bringing 150 people to the meeting to voice a valid point of view, which is not in any sense a violation of the rules of the organization in question, could not under any accepted holding of sham be viewed as sham conduct.

THE COURT: I think I have your argument. I think I should hear from Mr. Yerman.

MR. WRIGHT: Can I make two points?

THE COURT: Yes.

MR. WRIGHT: To the extent that Noerr has a theoretical basis other than the First Amendment, your Honor, it concerns also the question of whether or not the **[20]** Sherman Act was intended to cover collective efforts to persuade third parties to take action, and there is a finding by the jury that the ultimate decision here was not made on the floor; the ultimate decision was made by the board of directors.

THE COURT: That is like saying the Court of Appeals makes the ultimate decision on whether a conviction should be affirmed, but they may find themselves limited by what the trial court has done, which is, think, what happened here.

MR. WRIGHT: However, the facts don't indicate that. The facts indicate that the function of the standards council and the board of directors was to conduct de novo review not only of the procedural—

THE COURT: But I think their findings make it very clear, from what I saw at the trial, that they felt that because the rules had not been broken, there was very little they could do about it. That is pretty much what they said.

MR. WRIGHT: I disagree with that, your Honor. But nevertheless—

THE COURT: That is what the document in evidence suggests.

MR. WRIGHT: One last point. It is a policy argument.

[21] THE COURT: So I don't think that is dispositive. What about their argument, which is probably the best argument they make, I think, that exceptions to the antitrust law should be narrowly construed and therefore I should not construe it broadly?

MR. WRIGHT: It runs directly contrary to Justice Black. Justice Black said the opposite. Justice Black said that when you are in the political process, when you are in the realm of petitioning government, the sham exception to the validity of that conduct is to be narrowly construed. And that leads me directly to my point, the policy argument.

THE COURT: The question is, is Noerr-Pennington an exception to the antitrust laws or is it an interpretation of the antitrust laws?

MR. WRIGHT: The Second Circuit says it is an interpretation of the antitrust laws; however, grounded in very fundamental First Amendment freedoms. That is, when drafters of

the Sherman Act sat down and Congress had thought about whether or not they wanted to make a violation of the antitrust laws efforts by persons to go convince their Congressmen to legislate against their competitors, they would have specifically said that the Sherman Act was not intended to cover that kind of activity, otherwise it is impossible to reconcile the Sherman Act **[22]** within the dictates of the First Amendment.

Futhermore, that kind of conduct is simply not the kind of conduct that has been traditionally recognized as a private restraint. It is not a joint boycott. It is not a joint boycott when the restriction, when the restraint, flows from the legislature. And to the extent that the efforts were to convince the legislature to erect what in the final analysis may be a boycott, they can't get in the marketplace. Why? Because the legislature says they can't. To the extent that that was the approach, that is protected. That has to be protected.

The policy argument that I was going to refer to relates to recent events, recent events.

THE COURT: What do you say the law should be with respect to narrow exceptions to the antitrust laws?

MR. WRIGHT: That when you are balancing the application of the Sherman Act against First Amendment protections, the balance has to be tipped in favor of First Amendment protections. That is my response.

THE COURT: Mr. Yerman, you have heard the questions so you know what to respond to.

MR. YERMAN: Yes, that is correct.

THE COURT: You don't have to belabor all of the other things that I resolved in your favor.

Is the FTC going to argue, too? Didn't they **[23]** file an amicus curiae brief?

MR. YERMAN: They filed a brief.

THE COURT: Are they here?

MR. YERMAN: I don't know.

THE COURT: Maybe we never notified them to be here.

MR. YERMAN: Your Honor, Mr. Wright ended with a discussion as to the policy and a discussion as to the First Amendment rights or the constitutional rights as being a predominant issue. I would like to read to your Honor from Mr. Justice Black, who Mr. Wright seems to be relying on, in Giboney, cited extensively in our briefs.

"It is true that the agreements and course of conduct here were as in most instances brought about through speaking or writing. But it has never been deemed that an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, advanced, or carried out by means of language, either spoken, written or printed. Such an expansive interpretation of the constitutional guarantees of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society."

THE COURT: But the underlying assumption is **[24]** that the conduct is legal to begin with, and that is the issue we have to resolve here.

MR. YERMAN: If I could just go on. Another rather well-known champion of freedom of speech, Mr. Justice Douglas, quoted that language in particular in California Transport, where he said and went on to say:

"First Amendment rights are not immunized from regulation when they are used as a integral part of conduct which violates a valid statute."

So, your Honor, I was coming exactly to the point you raised. I think the First Amendment for these purposes is an irrelevancy.

THE COURT: It is not an irrelevancy to the extent that it is part of the reasons why we had Noerr-Pennington in the first place.

MR. YERMAN: I will grant your Honor that, of course. But to the extent that one cloaks illegal conduct—and I think that is where we are—in the guise of speech, the constitutional—

THE COURT: I don't have any trouble with the notion that if I rob a bank and I say, "Give me your money," the fact that I am using speech does not make my conduct protected.

MR. YERMAN: If you rig a vote, does your right to vote immunize your conduct?

[25] THE COURT: The question is, how do you rig it?

MR. YERMAN: The question is, if you bring in 250 people who otherwise wouldn't have voted, and a court and a jury have already found that that violates the consensus standard making process of the organization, haven't you committed a violation which you are trying to cloak with a claim that voting is the essence of political life?

THE COURT: Is that any different from getting out the vote in any organization?

MR. YERMAN: Let me turn to that.

THE COURT: Isn't that part of the democratic process, getting out the vote?

MR. YERMAN: I have no problem with getting out the vote. Let's turn to that.

THE COURT: In the last election Jesse Jackson went through the South signing up black voters and the Reagan people were out there signing up white voters. Isn't that what happens all the time?

MR. YERMAN: That's right, and Mr. Jackson was petitioning, he was exercising his constitutional right to have people vote their conscience. That is not what Allied did.

THE COURT: Not necessarily to vote their conscience. During the course of a political campaign **[26]** there are appeals to racism, sexism, ethnicity. People at times aren't voting their conscience at all; they are voting their prejudices.

MR. YERMAN: That is true.

THE COURT: Their self-interest also.

MR. YERMAN: Your Honor, if I tell someone who wouldn't otherwise vote that I will pay you to go to the polls and vote, and I want you to do that because you and I are in business together and we need that vote to pass this law that is to keep the other guy's product out of the code, that violates—

THE COURT: If there were no election law against it, that would not be illegal.

MR. YERMAN: Well, there is. 18 U.S.C. 597. It is a crime. It is a crime in the State of New York. And it is a crime in the U.S. Senate—well, it violates the rules of the U.S. Senate, if I am a company, to pay the expenses of a Senator to go and vote if he otherwise wouldn't have gone. That is right.

THE COURT: That may be.

MR. YERMAN: Your Honor, I don't know that we have these—

THE COURT: Is there any rule of the NFPA or any statute that prohibits them from doing what they did here?

MR. YERMAN: I don't think we have to worry **[27]** about that. The jury has already held that they violated consensus standard making of the NFPA.

THE COURT: I think that may be more relevant to the rule of reason than to Noerr-Pennington.

MR. YERMAN: But, your Honor, we all understand that conduct that subverts the process, conduct that is so shocking and outrageous, can't be protected by Noerr, no matter how you formulate Noerr.

THE COURT: The problem I have had with your argument, Mr. Yerman—maybe my conscience is not scrupulous enough —is that it really hasn't been shocked throughout this case by the defendant's conduct. My conscience has not been shocked, nor have I been impressed by the outrageous nature of what they did. What they did was to go out and sign up some voters and bring them to the meeting to vote their way, and you had the same privilege and you lost. Isn't that what it is all about? What is so outrageous about that? Had you brought five or eight more votes to the meeting you would have come out on top and they would have complained about your outrageous conduct. Isn't that what it is all about?

MR. YERMAN: I suppose I can't thicken your thin skin, but—

THE COURT: I say, as an ordinary part of every election I have ever been party to or seen, that's the way **[28]** it works—right down to my fraternity in college.

MR. YERMAN: I remember you said that. I have been living with that fraternity since the first day of the trial.

THE COURT: Did you belong to a college fraternity?

MR. YERMAN: I wish you never joined a fraternity, your Honor. This case might have gone along differently.

THE COURT: Did you ever belong to a Holy Name Society or one of those types of organizations?

MR. YERMAN: If I had a son I would never let him near a fraternity.

THE COURT: What about a Student Council election?

MR. YERMAN: Let me go back, in all seriousness, to the point we talked about a few moments ago. Because if I am correct—and I am, your Honor—that if what they did with these people were done in the Congressional ambit it would be a crime, then how can you excuse it at the NFPA?

THE COURT: Because there is no specific law that makes it illegal to pay the expenses of an NFPA member.

MR. YERMAN: I really would appreciate if I can give you these. Say, 18 U.S.C. 597.

THE COURT: This is a new argument anyway. I **[29]** don't think it is in your briefs.

MR. YERMAN: I will grant you I haven't given you statutes before.

THE COURT: It is not in the brief.

MR. YERMAN: Yes, it is. We talked about bribery all the way through the case. We have argued extensively—

THE COURT: In a case in which you had ample time, partly because of a delay caused by my calendar problems and partly because of a lot of time to brief the issues—and this case has not been known for its paucity of briefs—it is amazing that I should find this mentioned for the first time on argument. I have to think that it smacks of someone grabbing at the last straw one can find.

MR. YERMAN: If it is the straw that works, it is OK.

THE COURT: I am not sure it works.

MR. YEMRAN: We argued, your Honor, in our sham section that their conduct amounted to bribery. We said if you deem the NFPA to be a surrogate legislature, then they in fact bribed legislators. We made the argument.

THE COURT: Did you not pay the expenses of your own people to bring them to the meeting?

MR. YERMAN: We had three people, the same three **[30]** people we ever bring.

THE COURT: Did any rule forbid you from bringing more? Were you bribing your people when you paid their expenses?

MR. YERMAN: The argument we make, your Honor, is that the people they brought were people who otherwise wouldn't have come but for their conduct, but for their attempt to rig the vote. That is what the jury already found. If there is one thing that is pretty clear—and your Honor was pretty permissive in the evidence you allowed in; you allowed Allied to make a very strong argument that this was the kind of thing that went on every day, as you put it, it went on in the NFPA all the time—if there is one thing that is clear, it is that you took a liberal view of the evidence that would be allowed in the case to permit them in effect to show and to allow us to show whether this kind of conduct was what the NFPA allowed or not. And the one thing the jury found, if nothing else, was that, no, this is not a part of the game, this is not what you are supposed to do. You are not supposed to bring in 250 votes.

THE COURT: I don't think you have a fair argument that what they did here was bribery merely because there happened to be a specific statute that forbids a Congressman from accepting expenses.

[31] MR. YERMAN: I would just mention to you, if you don't mind, one second—

THE COURT: Bribery never applies to nonpublic officials.

MR. YERMAN: Oh, my point is that if it would have been bribery in a Congressional ambit, however, how can you hold them to a lower standard than you would hold the Congressmen?

THE COURT: Because I don't think these people are Congressmen.

MR. YERMAN: If they are not a surrogate legislature, then why are you going to apply Noerr altogether?

THE COURT: Because I think the Supreme Court certainly has held squarely in Noerr that conduct outside the legislative arena is protected. If lies are protected, I have a hard time understanding why paying someone's expenses to go to a meeting is not protected.

MR. YERMAN: Because lies are speech, but rigging a vote and tampering and subverting the process is conduct.

THE COURT: Lies are not protected speech. Even under your argument a lie would not be protected speech.

MR. YERMAN: It depends on the context. It depends on the context.

[32] THE COURT: Lies are never protected speech.

MR. YERMAN: I am going to get out these sections, if you don't mind.

THE COURT: You can get them out if you want to.

MR. YERMAN: 18 U.S.C. 600, and I would also suggest that you look at some of the New York laws. New York Election Law 17-140, 17-102, 17-142. I think that is enough.

Let me go on for a second. We talked a little bit about—

THE COURT: Are these Massachusetts statutes?

MR. YERMAN: New York. New York.

THE COURT: I don't know what relevance that has to a meeting in Massachusetts.

MR. YERMAN: I give them to you as an example of what state laws would hold.

THE COURT: Don't give me irrelevant state law. The meeting took place in Massachusetts.

MR. YERMAN: Then I will stay with U.S.C. The point, your Honor, is not so much whether the—well, all right, I will pass that, your Honor.

You mentioned a minute ago Hydrolevel. Let me get to that because you didn't know where Hydrolevel—

THE COURT: The Noerr-Pennington issue was never raised there.

[33] MR. YERMAN: To the best of my knowledge, it wasn't. Harold Tyler represented ASME in that case. I think Harold Tyler heard of Noerr-Pennington. That case, Hydrolevel, was decided a year before Wheeler. I am not going to try to read anybody's mind, but I submit to you that nobody ever thought of applying Noerr to that organization. Nobody ever would have dreamed of doing it. That is why it wasn't argued. And I will tell you—

THE COURT: Even good lawyers sometimes don't make arguments they should make.

MR. YERMAN: There were pretty good ones sitting on the Supreme Court and none of them thought of it either.

THE COURT: Because judges don't frame issues for the parties; lawyers do.

MR. YERMAN: I understand that, but listen to what they said.

THE COURT: Don't they say good cases make bad law and advocacy shapes the law?

MR. YERMAN: "A standard-setting organization like ASME"—they have already said about ASME in this same opinion that: "These codes, while only advisory, have a powerful influence: federal regulations have incorporated many of them by reference, as have the laws of most states, the ordinances of major cities, and the laws of all the provinces of Canada."

[34] So they were very much aware of the ASME code. It sounds like NFPA, OK?

In that same context what do they say about Asme?

"A standard-setting organization like ASME can be rife with opportunities for anticompetitive activity. Many of ASME's officials are associated with members of the industries regulated by ASME's codes." You could read "NFPA" for any of these.

THE COURT: But NFPA is not charged with any wrongdoing here and they were specifically dropped as a party, so that is irrelevant here.

MR. YERMAN: I will come to that. "Although, undoubtedly, most serve ASME without concern for the interests of their corporate employers, some may well view their positions with ASME, at least in part, as an opportunity to benefit their employers. When the great influence of ASME's reputation is placed at their disposal, the less altruistic of ASME's agents have an opportunity to harm their employers' competitors through manipulation of ASME's codes."

Read "NFPA" all the way through. Does that sound like an organization where the Supreme Court would allow Noerr-Pennington protection to the agents? They are talking about what the agents did. For the people like Beile—

[35] THE COURT: The facts are so far removed from the facts of this case as to be not even relevant.

MR. YERMAN: How different is what the guy did in ASME in setting up that phony letter from what Beile did in rigging the vote? How different is that?

THE COURT: Because, first of all, you have a wider range of what is permissible conduct when you are dealing with the setting of standards which is legislative than you have with what is adjudicatory. The Supreme Court has indicated that very clearly; the Second Circuit has followed that. And, what's more, the situation in that case is akin to a judge being on the payroll. I don't think it is anything like this case.

MR. YERMAN: I guess it—

THE COURT: Maybe that is why Judge Tyler didn't raise the Noerr-Pennington issue.

MR. YERMAN: I guess it turns on how thick your skin is.

THE COURT: It turns upon whether the cases are factually relevant or not.

MR. YERMAN: I think that one has to at least question whether it is appropriate to fashion a rule and build an extension to the antitrust laws to allow the Beiles of this world to be cloaked with antitrust immunity after what you and the jury saw them do at the NFPA to say **[36]** that not only what you did is OK, you rigged the vote, we all know it, but you can do it again or you can do worse and it is perfectly OK, you're exempt.

THE COURT: Isn't the remedy to change the rules of the organization?

MR. YERMAN: How many rules can you change? Do you know what the rules provide now in terms of getting something out of a code panel? You need two-thirds vote to get something out of a code panel. All you have to do is get three of your buddies on the code panel, pair your votes, and you can block it from the getting to the floor.

THE COURT: And then you have a remedy to do it yourself.

MR. YERMAN: Do what yourself?

THE COURT: The same thing they are doing. Bring your own voters to the meeting or go to the legislatures and tell them that the standard-making procedures of the NFPA are a farce and should not be followed. You have a remedy.

MR. YERMAN: If you want to take the former possibility, you recall I asked the jury that question: Is that how you want your codes written? And I think that is why it was a rule-of-reason violation here, so I think that was easy. And if your Honor wants to have more government regulation, not less, if your Honor wants to take things **[37]** like the NEC and see them wrecked so that the private organizations will not be able to use them, give them antitrust immunity and let them go on their merry way, as the Supreme Court says you can expect them to, let them go and do all this and the entire system will fall apart before your eyes. You won't have an NFPA; you will have every government setting up its own code and you will have a far less acceptable method than you have today.

THE COURT: Isn't that what Noerr-Pennington is about, because the legislature may not follow them?

MR. YERMAN: It brings me a little bit to the whole state action issue, which is an interesting parallel question here, a question I really need to ask you. The grounding of the Wheeling case and the more recent case, Sessions, was that in effect these are surrogate legislatures, and they use the words delegate authority by the state. I think your Honor is essentially saying the same thing. We all know that under state action, unless you have strict mandates, strict directions, strict supervision by the state, they wouldn't have state action immunity.

THE COURT: I don't think we are dealing with that question.

MR. YERMAN: No, we haven't. Do you know why it hasn't been raised? Because Allied wouldn't have the **[38]** temerity to argue—

THE COURT: Mr. Wright has a lot of temerity.

MR. WRIGHT: I do.

THE COURT: He would have raised it, I am sure.

MR. WRIGHT: You are quite right, your Honor.

MR. YERMAN: He wouldn't have the temerity to argue that they are covered by state action because they don't satisfy all the rules, that's correct. But think about the logic of it, your Honor. You would never give them state action immunity because—

THE COURT: The biggest problem, Mr. Yerman, is that I am not writing on a blank slate. I am writing on a slate which includes three Supreme Court decisions which are basically the touchstones. The Supreme Court in the Noerr case itself, which is the foundation case, has made it very plain that conduct outside of the legislative halls can be protected under Noerr-Pennington. They also said that conduct which smacks of unethical conduct, deceitful conduct, fraudulent conduct

even, is protectable under Noerr-Pennington. Against that background you want me to hold that this conduct, which amounts to a vote stacking at best, giving it the best possible interpretation, is somehow or other more outrageous and more unprotectable than lies. I am not writing on a blank slate.

MR. YERMAN: Maybe we are looking at different **[39]** slates, but there are essentially two cases that have said that the NFPA should get Noerr immunity. One is this Wheeling case and the other is this later Sessions case, which I submit to you are both distinguishable and wrong.

THE COURT: That is Judge Pfaelzer's case.

MR. YERMAN: Yes, exactly. I think you saw a letter from us on that. That case is clearly distinguishable.

THE COURT: Do you have a case in which the sham exception has ever been applied where there was concededly a genuine intent to influence legislative action and where there was a factual basis for the position taken?

MR. YERMAN: I can't think of one.

THE COURT: I didn't see one in your brief nor did I see one in Professor Handler's article.

MR. YERMAN: Speaking of Professor Handler—

THE COURT: If anybody sank a torpedo below the waterline aimed at your theory, I guess it was he.

MR. YERMAN: You and Mr. Wright had an interesting discussion I listened to as well, concerning what Professor Handler might or might not say about any of those particular situations. I want to be clear I don't speak for Professor Handler and, with all respect, he doesn't speak for me.

THE COURT: But he is an expert, is he not?

[40] MR. YERMAN: Professor Handler surely is an expert.

THE COURT: In antitrust law?

MR. YERMAN: In antitrust law.

THE COURT: He knows whereof he speaks.

MR. YERMAN: I answer questions; I don't act like the witnesses on the other side. That's correct.

THE COURT: We will seal this record so we don't show it to your senior partner, otherwise you are liable to find your percentage substantially reduced.

MR. YERMAN: Your Honor, I could argue sham. I believe there is a sham here. I believe this subversion of the process would amount to sham. I believe vote stacking would amount to sham. I believe what amounts to bribery in bringing people to vote subverted the process. People who did it because they had an economic interest because they worked for Allied or were associated with them and had really no alternative under the circumstances and did it under economic interest, I submit to you that would amount to sham.

But, quite frankly, your Honor, I don't believe we get to sham. I don't believe we get to sham, even though they paid their way to get there, even though they paid all their expenses, even though it is clear they wouldn't have been there but for Allied doing that.

[41] THE COURT: I may agree with you but for different reasons. I may agree we don't get to sham unless we find that the Noerr-Pennington doctrine applies. I agree with that.

MR. YERMAN: Yes. So I submit to you—

THE COURT: But if Noerr-Pennington is clearly applicable, I don't think there is any way the facts of this case would fit within the sham exception of the Noerr-Pennington doctrine.

MR. YERMAN: Coming back to Noerr-Pennington itself, there is no legal authority other than these two cases that says that you apply Noerr-Pennington immunity, this blanket immunity, down to the level of an NFPA. I understand your Honor's point.

THE COURT: It is not my point; it is the Supreme Court's point.

MR. YERMAN: I understand the argument that action outside the halls of Congress can still be immunized by Noerr-Pennington. But I ask your Honor, where would you draw that line? I mean, at what point? At what point does it become that Noerr-Pennington has swallowed the exception and swallowed the world? You talk about the exception being raised narrowly.

THE COURT: Mr. Wright does have a point. Where you argue that your injury flows, maybe that is where the **[42]** line is drawn. In any antitrust case where plaintiff alleges his injury flows from governmental action which is the predicate for his damages, Noerr-Pennington should apply.

MR. YERMAN: I am glad you raised the question.

THE COURT: That is his argument.

MR. YERMAN: Remember the damage charge. The damages that we were awarded in this case, your Honor, were strictly limited to the stigma placed upon the product by the denial of NEC approval. We were expressly told and the jury was expressly instructed there would be no damages awarded and they were not to consider any of the effects of lobbying or state action, or the actions of the state, rather, in considering the damages in the case. So I will take your Honor at your word. Hold me to the damage theory to which we were held and to the verdict to which we were awarded, and that is the issuance of the NEC and nothing else.

THE COURT: It has been a long while since I tried this case, but that sounds like a bit of a distortion of what happened, but I will let Mr. Wright respond to that.

MR. YERMAN: Your Honor—

THE COURT: I think there was a reason for that which you are not explaining. I don't fully remember it right now, but I am sure Mr. Wright will remind me.

[43] MR. YERMAN: Distortion is not a word that slides by me quickly. I do not mean to distort. I am giving you my best recollection.

THE COURT: I think your theory of damages all along was that your damages flowed from the fact that you were not approved and therefore not adopted by the state legislatures involved.

MR. YERMAN: We had discussions about that.

THE COURT: That was your theory of damages all along. When did you change it?

MR. YERMAN: When we got to the damage theory, and I won't say when did we change it, the damage theory really crystallized as the case progressed and in light of your Honor's thinking and rulings on Noerr.

THE COURT: Is it your position in this case that your damage did not flow from legislative action?

MR. YERMAN: Absolutely. Absolutely. And your Honor instructed—

THE COURT: That is not the case I remember trying.

MR. YERMAN: That is not the damage claim I would have preferred, I will grant you that, your Honor. But that is what was imposed upon us by your Honor's charge. I notice your clerk going to the transcript. Take a look at 3264 et seq., because you are welcome to read it. I **[44]** read it with some care.

THE COURT: I will read it.

MR. YERMAN: I certainly wouldn't mean to distort. But your Honor was very careful to charge that it was limited to the stigma, and that what they did in lobbying and all the rest of that was not to be considered.

THE COURT: But that was a different question. You never retreated for the purposes of this trial from your legal theory that your damages were caused by the nonadoption of your product by the state legislature.

MR. YERMAN: I think I have to disagree with that. I think I have to disagree with that. It was not something we did totally voluntarily but that is how it ended by virtue of your charge, your Honor. Let me read you what you said.

THE COURT: The computation of damages is one thing and causation is another. I don't think you ever retreated from your notion that your damages were caused by the nonadoption of your product by the state legislature.

MR. YERMAN: If I could just read.

THE COURT: Maybe that is the distortion that is lurking in the back of my mind.

MR. YERMAN: This is your Honor in the charge:

"The plaintiff does not seek damages resulting from any of the defendant's conduct other than its conduct **[45]** at the May 1980 meeting and its marketing of that defeat in the marketplace."

THE COURT: Correct.

MR. YERMAN: "To the extent that the defendant has sought to bring to the plaintiff's attention safety questions, to the extent the defendant has sought to legislate—to lobby before legislative bodies or political parties with respect to the safety question, the plaintiff does not claim any damages from that conduct, and such conduct may not be a proper predicate for you to assess any damages"—

THE COURT: And that is the distortion I had in my mind. All that charge is telling the jury is that obviously you were claiming no damages for conduct you concededly admitted was protected by Noerr-Pennington. That is the distortion I have in mind.

I have heard enough of your argument.

Mr. Wright, do you want to reply?

MR. WRIGHT: The theory of the case is embodied in paragraph 13 of the complaint. Paragraph 13 of the complaint describes what the National Fire Protection Association is and

does, and it says very explicitly, "NEC is advisory and does not carry the force of law. However, the NEC has been widely adopted as a comprehensive, mandatory safety standard by govermental bodies exercising **[46]** legal jurisdiction over electrical installations."

THE COURT: What are you reading from?

MR. WRIGHT: Paragraph 13 of the complaint, which was never amended, your Honor. "Approximately 37 states have adopted the NEC in whole or in substantial part as their statewide electrical code."

THE COURT: You might as well have quoted their opening and the summation, where I am sure the same statements were made.

MR. WRIGHT: "Thus, as a practical matter, any new product within the purview of the NEC must carry its approval in order effectively to compete and be sold in most parts of the nation." That is their theory, your Honor.

THE COURT: I don't think it was ever retreated from, and the passage from my charge you referred to, now that my memory has been refreshed, has to do with taking away from the jury any damage claims resulting from conduct concededly protected by Noerr-Pennington, to wit, the lobbying activities and your education of the public; that the damage claim was limited strictly to whatever damages flowed from the nonadoption of the product by NFPA.

Do you want to respond to his bribery argument?

MR. WRIGHT: Only that I guess if we committed a bribery, then bribery is rampant in the NFPA because—

[47] THE COURT: He said that you can't pay a Congressman's expenses so why should you be able to pay an NFPA member's expenses? It would not be protected at the Congressional level, why should you have more protection than you had at the legislative level? Admittedly the argument was sprung as somewhat of a surprise on you, because it wasn't argued in the briefs, as voluminous as they were.

MR. WRIGHT: The argument would be analogous if someone put $500 in cash in a paper bag and slipped it to the members of the board of directors and the standards council who were the governing body.

THE COURT: No, he says you can't pay a Congressman's expenses; that is bribery. Therefore, if you had paid a Congressman's expenses to go to Washington to vote on a bill, that would be bribery, so paying the expenses of an NFPA member is the same thing. Since you would not be protected in the halls of Congress, why should you be protected one step removed from the halls of Congress?

MR. WRIGHT: I understand the logic of the position. The reality is and the testimony is that the chairman of the NFPA was asked in a deposition, and the evidence is before you, as to whether or not it was in any sense contrary to the way the NFPA has always operated that **[48]** companies pay the membership fees and expenses of people who come to the meeting. Mr. van der Voort sat on this stand and I asked him very specifically whether his expenses were paid and whether all the other people who came from the plastics industry, to his knowledge, whether their expenses were paid. He said very definitely that was the case; there is nothing extraordinary about that.

The plain fact of the matter is, it has nothing to do with paying expenses. It rather has to do with the fact that they say that 150 is somehow a criminal violation of something, and 10 is not. How many is too many? The bribery is a total straw man, because everybody's expenses are paid by the companies.

The other response to that, the constitutional response to that, is that if you are dealing with petitioning of government, the Supreme Court of the United States has held specifically that companies are entitled to make contributions, in the Bellotti case, which we cited to your Honor.

THE COURT: But he says you can't pay a Congressman's expenses.

MR. WRIGHT: I suppose I can't deal with the logic of that position. I cannot deal with the logic of that position. However, it runs contrary to the way this organization works, it runs contrary to what is acceptable **[49]** behavior in the course of petitioning government.

THE COURT: In other words, stacking the vote is OK, he says, as I understand his argument, bringing them in is OK; what is really criminal here and takes you out of Noerr-Pennington is that you paid their expenses.

MR. WRIGHT: But I asked everyone who participates in the NFPA process, from the chairman of the organization down to Mr. van der Voort, whether or not that was the case, and they all unequivocally said there is nothing wrong with that, it is done all the while.

So the response to that is either the whole organization is rife with bribery and conspiracy or that kind of conduct cannot be the type of conduct, in the context of this organization, that rises to the level of criminal misconduct? It is simply not.

Again, I understand the logic of it. However, the reality of it is something entirely different, entirely different.

THE COURT: I am inclined to agree. I think if you are dealing with a situation in which the conduct was prescribed by the rules of the organization, you have a different case. The fact that at the Congressional level there may be a specific statute prohibiting that type of conduct is not dispositive for purposes of the Noerr-Pennington analysis.

[50] MR. WRIGHT: I have one observation, your Honor—that is the policy argument—and that is whether or not, if Noerr is applied here, standards making will be undermined and fall of its own weight because of the participation of interest groups. I submit to your Honor that if Noerr is not applied here, what will happen to this organization and to most of the standards-making organizations in this country is the following, and it has happened. People will be afraid to participate. They will be afraid to participate because they cannot go to an organization like this and they cannot stand up

and say, "I believe a product is unsafe; in fact, it is unsafe." Because if they do so and if some amorphous rationale is proposed by a lawyer some day that their activities which are not prohibited by the organization somehow violate the spirit of that organization, those individuals will be subjected to what we have been subjected to, and that is a five-year antitrust ordeal. Mr. Levinrad, I don't know if you remember Mr. Levinrad—

THE COURT: I remember Mr. Levinrad.

MR. WRIGHT: —Mr. Levinrad was one of the arch-opponents of plastics in construction and one of the foremost advocates of the need to deal with the toxicity issue. And we quote at great length from his comments in the '80 and '81 NEC. In the last session just last month **[51]** Mr. Levinrad stood up and said to the membership, "I am personally getting tired of this whole toxicity issue. It's been going on for a number of years"—that is not the quote, Allison. I will give you the quote. What he said was—

THE COURT: Sometimes these notes are not as helpful as they should be.

MR. WRIGHT: You know what he said? He said, "Someone came in to me the other day and said government officials are now subject to the antitrust laws. And that frightens me, ladies and gentlemen, it frightens me, and I think we ought to stop all of this and let this product go in."

He voiced, articulated, precisely the concern that we have been saying all along. If you hold the club of an antitrust trial over individuals because they are articulating genuine, valid, scientific concerns to standards, if you say you can be sued under the antitrust laws for that kind of conduct, everybody is going to keep their mouths shut.

If I were the general counsel to a company, and they came in and said, "Should we oppose this?" and the questions were, is there a valid basis for it? Yes. Is it in fact invalid? Yes. I still don't think you should go. I still don't think you should go, because Noerr-Pennington **[52]** doesn't apply, they can sue

you, and five years later, win or lose, you are going to spend God knows how much money defending yourself.

That is precisely why Noerr-Pennington exists. That is precisely why Noerr-Pennington exists. You can't submit people in the course of petitioning government to that kind of fear. Noerr-Pennington says, we will remove that fear. Petition. Speak out freely. It is safe to do so. That is what this case is all about.

THE COURT: I am prepared to rule today after an appropriate recess.

MR. YERMAN: Can I just respond to one small point, which is irrelevant but since Mr. Wright raised it. He mentioned a meeting. I thought you would be interested to know that at that same meeting the NFPA voted to eliminate the three-story restriction on the product.

MR. WRIGHT: Because everybody was afraid to say otherwise.

MR. YERMAN: By a vote of 600 to 10.

THE COURT: I really had intended to write an opinion in this case. Unfortunately, the pressures of my criminal calendar over the past year have foreclosed the likelihood that I could do that within the time parameters I originally envisioned. I scheduled this case for argument today with the assumption that, if possible, I **[53]** would rule from the bench, dictate my opinion into the record, so there would be no further delay. This case was tried, I think, and finished last May, and the papers were in sometime last summer, in September or thereabouts. I think that the process of the appeal has already been delayed by my inability to prepare the opinion I intended to prepare and hear argument earlier. As the parties are aware, I have been constantly engaged in criminal trials since September, including a five-month multidefendant narcotic trial, which foreclosed my ability to do exactly what I intended to do. I do not think that the appeal of this case should be further delayed, so I am prepared to rule after a five-minute recess.

(Recess)

[FILED AUG 1 1986]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 Civ. 6250 (JES)

INDIAN HEAD INC.,
Plaintiff,

—against—

ALLIED TUBE & CONDUIT CORPORATION,
Defendant.

ORDER

WHEREAS, a Jury Trial having been held before the Honorable John E. Sprizzo, U.S.D.J., beginning on March 4, 1985, and the jury, at the conclusion of the trial, having answered the attached interrogatories and in so doing having rendered a verdict in favor of plaintiff in the sum of $3,800,000.00; and

WHEREAS, defendant having moved for judgment notwithstanding the jury verdict on the grounds (1) that the evidence introduced at trial was insufficient as a matter of law to sustain the jury's answers to Interrogatories 5, 10, 11 and 12, (2) that the jury's answers to the interrogatories were insufficient as a matter of law to sustain its verdict that defendant's conduct constituted an unreasonable restraint of trade, and (3) that the *Noerr-Pennington* doctrine and the First Amendment to the United States Constitution bar entry of judgment in plaintiff's favor; and

WHEREAS, defendant having moved for a new trial on the grounds (1) that the Court's charge to the jury with respect to the Rule of Reason was incorrect, (2) that the jury's answers to

the interrogatories were inconsistent, and (3) that the jury's answers to Interrogatories 5, 10 and 12 were not supported by the weight of the evidence; and

WHEREAS, the Court, on June 27, 1986, having issued a bench opinion with respect to defendant's motions;

IT IS HEREBY ORDERED:

(1) That defendant's motion for judgment notwithstanding the jury verdict is GRANTED on the ground that the *Noerr-Pennington* doctrine applies to this case; and

(2) That defendant's motion for judgment notwithstanding the jury verdict is DENIED in all other respects on the grounds (1) that the evidence introduced at trial was sufficient as a matter of law to sustain the jury's answers to Interrogatories 5, 10, 11 and 12, and (2) that the jury's answers to the interrogatories were sufficient to sustain its verdict that defendant's conduct constituted an unreasonable restraint of trade; and

(3) That plaintiff's motion for a new trial is DENIED on the grounds (1) that the Court's charge to the jury with respect to the Rule of Reason was correct, (2) that the jury's answers to the interrogatories were consistent, and (3) that the jury's answers to Interrogatories 5, 10 and 12 were supported by the weight of the evidence; and

(4) That in the event that this Court's ruling on defendant's motion for judgment notwithstanding the jury verdict is hereafter vacated or reversed, defendant's motion for a new trial should be DENIED on the grounds (1) that the Court's charge to the jury with respect to the Rule of Reason was correct, (2) that the jury's answers to the interrogatories were consistent, and (3) that the jury's answers to Interrogatories 5, 10 and 12 were supported by the weight of the evidence.

Dated: New York, NY
July 31, 1986

/s/ [JOHN E. SPRIZZO]
U.S.D.J.

[FILED AUG 4 1986]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 Civ. 6250 (JES)

INDIAN HEAD INC.,
Plaintiff,

—against—

ALLIED TUBE & CONDUIT CORPORATION,
Defendant.

A Jury Trial before the Honorable John E. Sprizzo, U.S.D.J., having begun on March 4, 1985, and at the conclusion of the trial the jury having answered the attached interrogatories and in so doing having returned a verdict in favor of the plaintiff in the sum of $3,800,000.00; and the Court having reserved its decision on legal defense, treble damages and attorneys' fees; and the Court thereafter on June 27, 1986 having issued the attached bench opinion with respect to defendant's motions for judgment notwithstanding the jury verdict and for a new trial; and the Court, on July 31, 1986 having issued the attached ORDER (i) that defendant's motion for judgment notwithstanding the jury verdict be GRANTED and that judgment be entered in favor of defendant, (ii) that defendant's motion for a new trial be DENIED, and (iii) that in the event that the Court's ruling on defendant's motion for judgment notwithstanding the jury verdict is hereafter vacated or reversed, defendant's motion for a new trial should be DENIED, it is,

ORDERED, ADJUDGED AND DECREED: That judgment be and it is hereby entered in favor of defendant and that the complaint be and it is hereby dismissed.

Dated: New York, N.Y.
July 31, 1986

/s/ [JOHN E. SPRIZZO]
U.S.D.J.

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON 8-6-86.

[FILED APR 22 1987]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 86-7734, -7758

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of April one thousand nine hundred and eighty-seven.

Present: HON. J. EDWARD LUMBARD
HON. AMALYA L. KEARSE
HON. GEORGE C. PRATT

Circuit Judges.

INDIAN HEAD, INC.,

Plaintiff-Apellant,
Cross-Appellee,

—against—

ALLIED TUBE & CONDUIT CORPORATION,

Defendant-Appellee,
Cross-Appellant.

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the Judgment of said District Court be and it hereby is vacated and the action be and it hereby is remanded to the said district court for further proceedings in accordance with the opinion of this court.

ELAINE B. GOLDSMITH,
Clerk

/s/ EDWARD J. GUARDARO
By: Edward J. Guardaro,
Deputy Clerk

[RECEIVED MAR 4 1980]

(Letterhead of REPUBLIC STEEL, Cleveland, Ohio)

February 29, 1980

Mr. Steve E. Chehi
Manager, Sales Engineering
Bethlehem Steel Corporation
Bethlehem, PA 18016

Dear Steve:

Subject: 1981 National Electrical Code
Request for CONSTAND Action

The future of the role of steel conduit in construction is in serious danger . . . as a result of certain proposals up for adoption in the proposed 1981 National Electrical Code.

If these proposals are adopted the entire concept of the use of non-combustible service equipment materials in non-combustible construction is in danger. This involves steel pipe tubular products and flat roll products of many types.

The vote on the 1981 NEC takes place at the Sheraton Boston at 1 p.m., Tuesday, May 20, 1980.

The combined market well exceeds 1 million tons annual usage.

It appears that the National Electrical Code is the first major battleground for the attack on steel markets by segments of the plastic industry during the 80's.

The battle plan involves three major actions:

1. Consider what legal steps can be taken to:
   Receive a fair hearing on certain specific code proposals.
   Challenge questionable code panel actions and procedural issues.

2. Develop in simple, understandable form all the facts we can to support the steel position. This means:

   Refining all existing research and fact data;

   Developing new data to challenge specific issues.

3. Get people to the NFPA meeting in Boston in May to vote. To counter the plastics industry, steel needs 1,000 votes.

Specific requests for CONSTAND consideration include:

1. Investigation of legal recourses concerning NEC Code panel actions.

   A review by AISI Engineering and Legal staff is suggested to determine if NFPA-NEC code approval procedures have been abused to the point where AISI staff should ask the NEPA Standards Council or Board of Directors to:

   A. Conduct new NEC hearings based on evidence that the concerned code panels did not:
      1. Properly consider counter arguments,
      2. Adequately consider the foreseeability and probability of harm to the public that could occur should certain proposals be approved that are based on incomplete or misleading scientific data,
      3. Did not use or adopt the proper terminology in proposed code sections they approved,
      4. And, violated their own procedures to assure a fair hearing for all concerned parties.

   B. Return all of Panel 8 and Panel 16 to committee for complete review for the re-submittal in 1984, if allegations in 1.A are confirmed.

2. Development of needed fact data. AISI through the Engineering Division should be asked to develop the needed fact and research data to support the steel position against adoption of questioned proposals for

the 1981 NEC. Such action includes the following suggestions:

A. By the Sub-Committee on Fire Technology:
   1. A review of existing fire/smoke test criteria to support AISI position;
   2. Conducting special tests to determine:
      a. Flammability/smoke/toxic gas characteristics of certain plastic materials proposed for code approval in relation to steel performance.
      b. Performance of closed system conduit runs in relationship to the combustibility and integrity of wiring within the conduit.

      (These procedures underway as result of Sub-Committee of Fire Technology meeting 2/26/80)

B. By Engineering Division:
   1. Preparation of data on other than fire characteristics of plastic products being proposed for NEC approval.
   2. Preparation of all engineering data into a simplified written document for use at the NEC meeting in Boston and before if deemed appropriate.
   3. Presentations by Engineering Division staff to groups and individuals to gain their support of the steel position in Boston.
   4. Aid by staff in efforts by member companies to gain support for steel position with other organizations prior to Boston voting.

3. An all out effort to develop votes supporting the steel industry position in Boston. To do this it is suggested CONSTAND:

A. Ask each member company to register as many as possible of their individual company members to be present May 20 to vote. (One conduit manufacturer has pledged 100 votes)

B. Request the Engineering Division to urge as many potential voters as they can outside the steel industry to be present to vote.

C. Request all Engineering Division members and product staff men to be registered and present to vote.

D. Have the Engineering Division keep member companies informed of progress in securing votes in support of the AISI position.

This issue is clear. Is it worth keeping electrical, mechanical and hydraulic components and systems and materials in fire-rated, non-combustible construction truly non-combustible and non-smoke/toxic gas producing?

Since time is critical, these suggested actions should be considered as quickly as possible. All new applications for membership to NFPA must be processed by April 15 if they are to vote.

Please let me know what I can do to expedite this matter.

Sincerely yours,

R. E. Taylor
Chairman, Sub-Committee
Fire Technology
Republic Steel CONSTAND alternate

RET/sh

cc: Mr. R. Wildt
Mr. D. G. Cook
Mr. C. G. Tyson
Mr. R. G. Gawain
Mr. L. T. Young

INTER-OFFICE CORRESPONDENCE

FROM: James E. O'Donnell Date 1/22/80

To: James Griffin

Subject Electrical Non-Metallic Tubing (ENMT)

As you know, Panel #8 is now considering a proposal to permit the use of plastic EMT without restriction. The final vote on this at the current Code Panel Meeting is by ballot and this product could possibly be accepted. The last line of defense against this product would be later in the spring at the National Fire Protection Association Meeting in Boston, Massachusetts. It will certainly be challenged again at this meeting but the acceptance by Panel 8 is a giant step for the plastic industry toward the goal of full acceptance in the National Electrical Code.

In talking with Charlie Hart, the NECA representative, he explained that a challenge can only be made from the floor at the NFPA Meeting if we submitted comments in advance that are printed in the technical documentation publication. Have we or have others in our industry made such comments?

If we fail to keep this product out of the Code, we will certainly suffer the loss of a substantial portion of our EMT business in years to come.

/s/ JIM E. O'DONNELL/md
Jim E. O'Donnell

JEO'D:md

cc: J. Feeney

INTER-OFFICE CORRESPONDENCE

WHEATLAND TUBE COMPANY
WHEATLAND, PENNSYLVANIA, 16161

TO: J.E. Feeney, H. Weiss, P. Dooner, J. O'Donnell

DATE January 30, 1980

FROM J. L. Griffin

SUBJECT ARTICLE 331—ELECTRICAL NONMETALLIC TUBING (ENMT)

The attached copies of the proposal from the "Preprint" describes the product and its application. It is supposed to be rigid, in 3 sizes 1/2", 3/4", and 1". It is to be used with approved fitting, can be bent without heating, and can be used indiscriminately. Also attached is the U.L. fact-finding report on ENMT.

The NEMA 5 RN Code meeting in Washington, D.C. on January 30, 1980 produced the following points:

1) NEMA can do nothing for us.
2) Final ballot results will not actually be known until the publication of the "Technical Documentation" by NFPA in March.
3) Each individual company will be asked to provide for the attendance of as many NFPA voting members as possible. Voting eligibility requires NFPA membership 30 days prior to the NFPA meeting in May.
4) Individual members of 5 RN will have to contact influential members of the other NFPA sections for support in defeating adoption of this new Article 331—Electrical Nonmetallic Tubing.
5) Discussions regarding ENMT must be related to safety aspects only. Problems regarding restraint of trade are a very real concern. This situation precludes discussing other aspects of the product directly although free

discussion of the fact-finding report and other test data that might become available is permissible.

The Section meeting in February may produce other strategy, but I doubt that anything now will evolve from the meeting. Certain people will probably be assigned to make contact with various people that they may be able to influence prior to the NFPA meeting in Boston, which might require some travel, but all the activity we engage in will have to be low key.

I will keep in touch with Bob Taylor and Bill Biele and keep everyone informed if anything develops before the NEMA section meeting in Florida.

J. L. Griffin

lr

Enc.

REPUBLICSTEEL

Market Communications and Advertising
Interoffice Correspondence
General Office

February 25, 1980

Mr. T. E. Wilkens
Manager of Sales
Electrical Products
Steel and Tubes Division

Subject: NEMA STEEL CONDUIT 5RN SECTION MEETING REPORT CALL FOR URGENT ACTION

The future of the role of steel conduit in construction is in serious danger . . . as a result of certain proposals up for adoption in the proposed 1981 National Electrical Code.

Also in danger is the entire concept of the use of non-cumbustible service equipment materials in non-cumbustible construction. This involves steel pipe, tubular products and flat roll products of many types.

The combined market well exceeds 1 million tons annual usage.

It appears that the National Electrical Code is the first major battleground for the attack on steel markets during the 80's.

The battle plan involves three major actions:

1. Get bodies to the NFPA meeting in Boston in May to vote. To counter the plastics industry we need 1,000 votes going.
2. Develop in simple, understandable form all the facts we can to support the steel position. This means:
   - Refining all existing research and fact data;
   - Developing new data to challenge specific issues.
3. Consider what legal steps can be taken to:

   - Remove specific code proposals from consideration;
   - Challenge questionable legal practices of code panel actions.

At question is:

- Restraint on due process of law;
- Unfair trade practice;
- Non-defined or improperly defined NFPA procedures.

Action under Plan Once includes:

1. Getting bodies to vote at the floor meetings. Allied Tube & Conduit has pledged 100 people.

   Within Republic I believe we should have at least 50. Every safety supervisor who is a voting member of NFPA should be there. We should make up any difference with new members. This must be done within *30 days* if they are to be registered in time to vote.

In addition:

- NEMA members plan to contact all steel companies, allied steel users and the Japanese conduit suppliers within the next two weeks urging them to add members and to be in Boston to vote.
- NEMA 5RN members themselves are going all out to have bodies on the floor to vote.
- All organization members favorable or non-committed to steel or plastics are being asked for their votes.
- Major work is to proceed within other allied organizations to gain every vote possible at the meetings. The attached criss-crossing list shows the inter-relationships involved.
- Fittings manufacturers are being asked to take part.

2. Develop all the information we can to factually present our case against the adoption of questioned sections of the code. This includes:
   - Crash testing to develop true merits of new products being sponsored by plastic companies for NEC adoption. (If we can get materials.)
   - Consolidation of main points from existing research defending steel position.
   - Preparation of information data sheets for use at the proper time to ask for votes for our positions.
   - Make every presentation possible to voting bodies and members seeking their votes before the meetings.
   - Get to everyone possible at the meetings to gain their votes through personal contact.
3. Consider and review possible legal action to stop certain proposals from being considered at the meeting.
   - All member companies are being asked to review legal implications of NFPA panel actions with their legal counsel. A unified legal approach is to be discussed in Chicago on March 11.
   - NFPA rules and procedures for the NEC voting are being cross-checked in writing with the NFPA for clarification.

Time is critical. It appears I'm acting as overall coordinator of activities, as Chairman of 5RN Codes & Standards.

The question to ask is—what is it worth to save our conduit business—as well as steel water pipe and certain markets for steel sheets?

We need at least 50 people from Republic to be in Boston to vote. This will cost up to $40,000. The special testing another $10,000 and the special literature another $10,000.

We thus need assurance of $60,000 for this campaign right now. The message can't be more urgent. Will you please move this on for top level involvement as quickly as possible. I'll be glad to supply more details.

Tuesday, the AISI Sub-Committee on Fire Technology will address this subject in even greater detail. I'll advise you of those results as soon as I return.

Sincerely,

/s/ R. E. TAYLOR
R. E. Taylor
Coordinator
Codes and Standards

RET/hs

Attachment

CC: Messrs. J. B. Anderson
J. D. Donohoe
R. Hennie
D. H. Kelly
D. W. Kelly
L. T. Young

BEST AVAILABLE COPY

Chart C

Key Influences Involved in Adoption of 1981 National Electrical Code Input To and Voting

Organizations:

National Electrical Manufacturers Assoc.

International Assoc. of Electrical Inspectors

ASHRAE

ASTM

Fire Marshals of North America

International Assoc. of Fire Chiefs

American Insurance Association

Society of Fire Protection Engineers

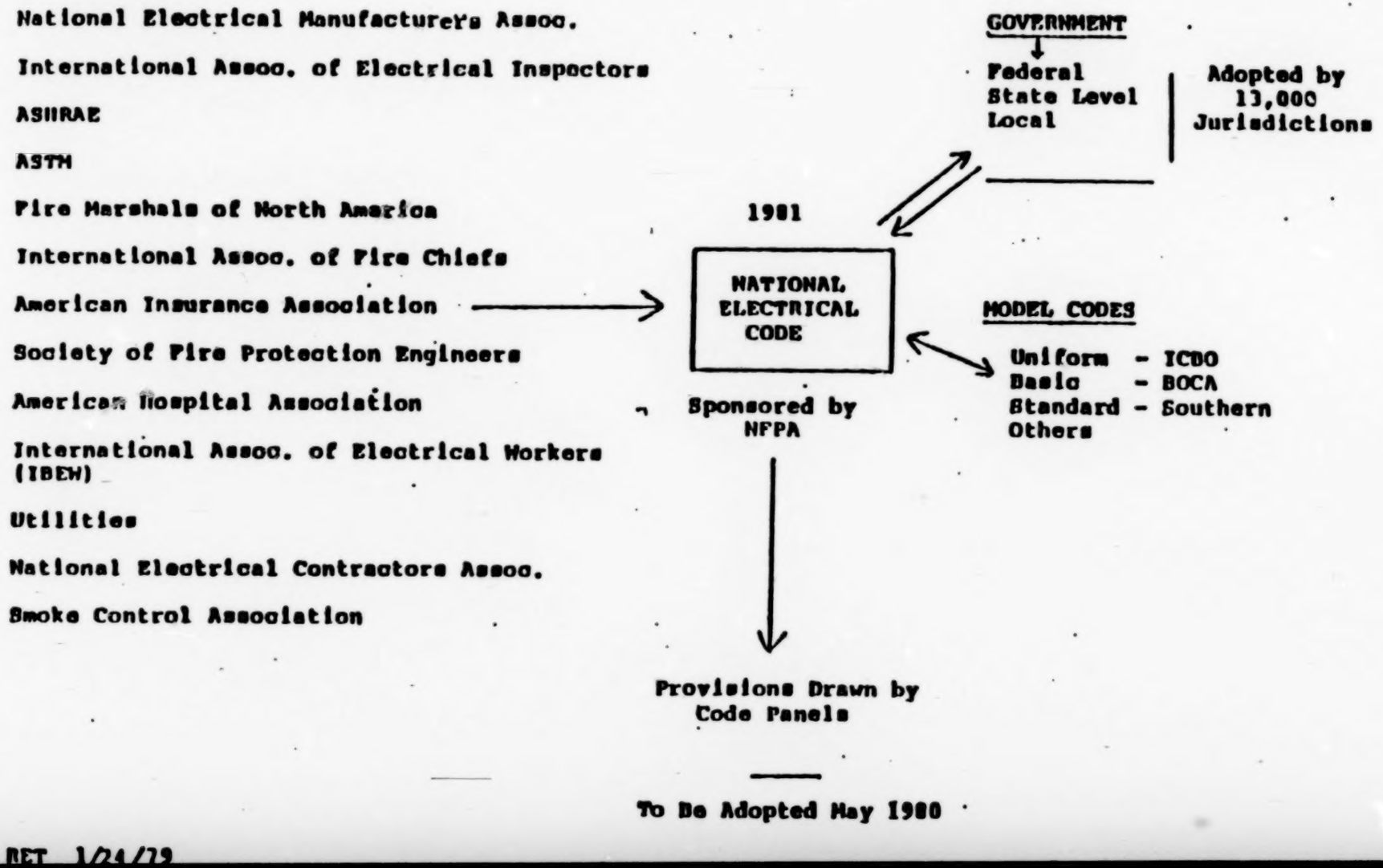
American Hospital Association

International Assoc. of Electrical Workers (IBEW)

Utilities

National Electrical Contractors Assoc.

Smoke Control Association



RET 1/24/79

ALLIED EXPENSES
MAY 1980 NFPA MEETING
AND ALLIED SALES MEETING

MEMBERSHIP FEES (155 members)	$7,698.00
MEETING REGISTRATION FEES (153+ attendees)	$9,210.00
FOOD AND LIQUOR EXPENSES	
Cocktail party, breakfasts, luncheons	$9,162.55
Employee meals	$ 984.96
Employee business meals and entertainment	$2,764.21
Box lunches	$ 736.25
Subtotal, Food and Liquor Expenses	$13,647,97
HOTEL/LODGING EXPENSES	$29,271.00
TRAVEL EXPENSES	
Agents' Airfare (47 agents)	$17,759.80
Agents' Automobile Expenses (1 agent)	$ 57.65
Employees' Airfare (58 employees)	$17,766.00
Subtotal, Travel Expenses	$35,583.45
OTHER EXPENSES	
Walkie-talkies	$ 340.00
Employee cab, bus and car fares	$1,319.27
Employee miscellaneous expenses	$1,038.50
Printing expenses (booklets)	$3,059.06
Subtotal, Other Expenses	$5,756.83
TOTAL	$101,167.25

No. 87-157

Supreme Court, U.S.
FILED
NOV 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALLIED TUBE & CONDUIT CORPORATION,

Petitioner,

vs.

INDIAN HEAD, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

MARVIN E. FRANKEL
(Counsel of Record)
ROBERT M. HELLER
ARTHUR B. KRAMER
ERIC O. CORNGOLD
DEBORA K. GROSSMAN
JONATHAN D. POLKES
JEFFREY S. TRACHTMAN
KRAMER, LEVIN, NESSEN,
KAMIN & FRANKEL
919 Third Avenue
New York, New York 10022
(212) 715-9100
Counsel for Petitioner

QUESTIONS PRESENTED

In an effort to influence state and local legislative enactment of the National Electrical Code ("NEC"), a model code prepared by the National Fire Protection Association ("NFPA") that is widely disseminated and adopted in legislative codes, petitioner "packed" an NFPA meeting seeking to prevent inclusion of respondent's product in the NEC on the ground of its toxicity and dangerousness. The action violated no rule of the NFPA. There was specific evidence, believed by petitioner, that respondent's product was unsafe. Petitioner also acted on the recognition, however, that its success at the NFPA would, if followed by legislative enactment of the NEC, restrain the competition of that product. The questions presented are:

1. Whether petitioner's action in the NFPA meeting could be held an actionable restraint of trade leading to treble damages under the Sherman Act consistently with *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and succeeding decisions of this Court further defining the doctrine of that case.

2. Whether, even without regard to the *Noerr* doctrine, such lobbying and voting tactics, otherwise lawful and in compliance with the rules of a code-making association, are proscribed by the Sherman Act if a jury finds they "subvert" the rules.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-157

ALLIED TUBE & CONDUIT CORPORATION,

Petitioner,

vs.

INDIAN HEAD, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 817 F.2d 938 (2d Cir. 1987). The oral opinion of the district court (Pet. App. 23a-32a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 22, 1987. A timely petition for rehearing was denied on June 11, 1987. The petition for a writ of certiorari was filed on July 23, 1987 and was granted on October 5, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal.

RULE 28.1 STATEMENT

Allied Tube & Conduit Corporation is a wholly owned subsidiary of Atcor, Inc., which is a wholly owned subsidiary of Tyco, Inc.

STATEMENT OF THE CASE

I. The Facts

The basic facts are well stated in the opinion of the court of appeals (Pet. App. 3a-8a). That account is quoted here for convenience:[1]

"The evidence presented to the district court established the following: Carlon, a division of Indian Head, Inc., manufactures and sells flexible plastic electrical conduit made from polyvinyl chloride (PVC). Electrical conduit is hollow tubing used in building construction to carry insulated electrical wires

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1 Petitioner and respondent have been referred to, respectively, as Allied and Carlon throughout, and those designations are followed in this brief.

through floors, walls, and ceilings, and outside buildings, and to protect the wires from damage or abuse. Carlon's product competes in the marketplace against steel conduit, of which Allied is the largest producer in the United States. Carlon claims that PVC conduit [also known as electrical non-metallic tubing or ENMT] has a number of significant competitive advantages over steel conduit, including its pliability, its lower installed cost, and its lower susceptibility to short circuiting. On the other hand, as the district court instructed the jury, 'there is a scientific basis for a concern about safety of PVC products with respect to toxicity. . . . [T]he parties do not dispute that people disagree on the issue and there is an objective basis for a concern for safety.' Allied particularly stresses the fact that, during fires in high-rise structures, PVC conduit may burn, emitting toxic smoke and fumes.

"This case arises from Allied's efforts to block Carlon's proposal to include PVC conduit as a permissible type of electrical conduit in the 1981 edition of the National Electrical Code (NEC)—a model code, promulgated by the National Fire Protection Association (NFPA), which establishes product and performance requirements for electrical systems, including electrical conduit. The parties agree that NEC is the most widely disseminated and adopted model code in the world. The parties agree further that a substantial number of state and local governments adopt the NEC as law in whole or in part.

"Every three years, the NFPA—a private, voluntary organization composed of over 31,500 individual and group members representing industry, labor, academia, insurance, organized medicine, firefighters, and government—revises the NEC through a multi-step, several-year-long process. The NFPA first submits proposed amendments to the NEC to a Code-Making Panel (CMP) made up of professionals with technical expertise in the area. In order to prevent domination by special interests, no more than one-third of any CMP's membership may represent a single interest. If approved by the CMP, a proposal then goes to the full membership, together with the comments and voting position of each CMP member. After the membership has had an opportunity to comment on the pro-

posal, the CMP considers it a second time, along with the membership's comments. If again proposed, the NFPA publishes the proposed amendment to the full membership. The entire membership then votes.

"In 1980, when Carlon's proposal was being considered, a simple majority of those present at the annual meeting was sufficient to approve or reject a proposal. Disappointed members can appeal the membership's vote to NFPA's Standards Council and ultimately to its Board of Directors. Finally, NFPA rules also permit *de novo* review of a defeated proposal by the CMP, the Standards Council, and the Board of Directors, in a procedure known as a Tentative Interim Amendment (TIA). If adopted, a TIA includes or excludes a proposal on an interim basis until the next code cycle.

"On September 18, 1978, Carlon began the process of obtaining NEC approval for PVC conduit by submitting its proposal, known as Article 331, to the NFPA, along with a fact-finding report by the Underwriters Laboratories. The NFPA directed the proposal to CMP-8, which initially rejected it. However, in December, 1979, based on further fact-finding and field demonstrations by Carlon, CMP-8 reversed its earlier decision and approved Article 331 for review by the full membership. The NFPA then scheduled the article for consideration by the full membership at the next annual meeting, to be held in Boston in May, 1980.

"Recognizing that inclusion of PVC conduit in the NEC might adversely affect its sales of steel conduit, Allied's representatives met with a number of different groups, including other members of the steel industry, to gather votes in opposition to Article 331. On January 30, 1980, the Steel Rigid Conduit and Electrical Section of the National Electrical Manufacturers Association (NEMA) held a meeting to discuss the matter. At that meeting, and at a full meeting of the NEMA Steel Section held in February, everyone agreed to bring as many voters as possible to the upcoming NFPA meeting; Allied itself pledged to bring at least 100 people to vote against Article 331. Additional meetings and communications were

held among the steel interests to coordinate their efforts to block Article 331's adoption. Acting within the letter of NFPA rules, Allied eventually arranged for 155 persons—including employees, sales agents, the agents' employees, company executives, employees of two of Allied's divisions, and the wife of the national sales director—to join the NFPA, to register as voting members, and to attend the annual meeting to vote against the proposal. Allied also paid over $100,000 for the membership, registration, and attendance expenses of these voters. The other steel interests similarly recruited and paid for the expenses of voters at the May, 1980 meeting. In total, the steel interests gathered 230 votes.

"Carlon made no attempt to sign up additional employees or sales agents other than the four already scheduled to attend the meeting. Until about April 18, 1980, H. F. van der Voort, who coordinated Carlon's efforts to amend the NEC, apparently believed that the NFPA's rules did not permit a motion from the floor to return Article 331 to CMP-8. On or about April 18, van der Voort discovered that such a motion could, in fact, be made. By this time, Carlon could not have signed up additional members to vote at the May meeting; under NFPA rules, only those who have been NFPA members for at least 30 days could vote at an annual meeting. However, Carlon did solicit support from members of the Society of Plastics Industry, the NEMA plastics section, other members of the plastics industry, NFPA's railroad and health care sections, and the Fire Marshals Association of North America.

"At the annual meeting, Allied instructed its personnel where to sit, based upon a detailed seating chart, and appointed group leaders to instruct the voters 'how the discussion is progressing and how to vote.' Boxed lunches were provided and the voters were told to 'stay nailed to their seats' until the end of two evening sessions. Group leaders used walkie-talkies and hand signals to facilitate communication. Few of Allied's voters had any of the technical documentation necessary to follow the meeting; nor did any of them speak in opposition to Article 331 in the course of the meeting.

"Two votes were taken on the motion to return Article 331 to CMP-8. The first, a voice vote, was inconclusive. The second, a standing vote, approved the motion by a vote of 394-390. To insure its victory, Allied insisted that its representatives remain in their seats until 2:00 a.m., when the NFPA membership voted to approve the entire NEC, without Article 331. [The voting session began after 1:00 p.m. and lasted 12 hours, with the debate on Article 331 consuming about thirty minutes (Tr. 194-95; 1322; A. 1760-80).[2]] Carlon immediately appealed the decision of the membership to the Standards Council, which referred the appeal to the Board of Directors. Finding that the NFPA rules had been circumvented but not violated, the Board denied the appeal, and returned Article 331 to the CMP-8. In June, 1980, Carlon applied for a TIA including Article 331 in the 1980 NEC. After the proposed TIA wound its way through the various levels of the code-making process, encountering opposition by Allied at each step, a subcommittee of the Board of Directors found that Carlon's request was not sufficiently exigent to warrant issuance of the TIA."[3]

II. The Claims, Defenses and Verdict

A. *The Liability Phase*

Carlon began this action against Allied and the NFPA[4] on October 9, 1981, alleging that they, the American Iron and Steel Institute, other steel conduit manufacturers and Allied's independent sales agents had "combined and conspired to prevent competition from non-metallic tubing by excluding it

2 References preceded by "Tr." are to pages of the trial transcript; those preceded by "A." are to pages in the Joint Appendix in the court of appeals; those preceded by "J.A." are to the Joint Appendix in this Court; and those preceded by "P.X." are to plaintiff's exhibits.

3 The NFPA Board of Directors was greatly concerned about the toxicity issue and "simply did not want to run the risk of compounding the [safety] problem when, in fact, [they] needed considerably more data than was available at the time" (A. 2843-44).

4 In August, 1982, Carlon discontinued its action against the NFPA. Terms of the settlement were not disclosed.

from the 1981 NEC" (J.A. 9). The complaint stated that "[a]s promulgated by defendant NFPA, a private corporation, the NEC is advisory and does not carry the force of law" (J.A. 7). But exclusion from the NEC was nevertheless alleged to cause injury because the NEC is routinely and "widely adopted" as law, "in whole or in substantial part," in statewide and municipal codes (*id.*).

Carlon's injury was alleged to flow directly from that legislative action in adopting the NEC (J.A. 13-14):

> Because of the adoption and application of the NEC by states and municipalities as described in paragraph 13 above, the combination and conspiracy had and continues to have the following unlawful effects, among others:
>
> (a) Carlon has been almost wholly excluded from selling non-metallic tubing in competition with steel tubing manufactured by defendant Allied and others of the co-conspirators.

A bifurcated jury trial commenced on March 4, 1985. Carlon tried the case on its stated theory of liability—that legislative adoption of the NEC was the cause of its injury. Pressing this concept, Carlon's opening to the jury (Tr. March 5, 1985 at 11-12) stressed that

> many states and local statutes expressly adopt the provisions of the NEC in whole or in part and use that as their local law.
>
> [I]t is not disputed in this case that it is necessary that a firm seeking to market a new electrical product, such as electrical non-metallic tubing, must obtain approval for the new product in the National Electric Code, the NEC.

Carlon's evidence emphasized the proposition that any harm it suffered resulted because exclusion of ENMT from the NEC led to the product's exclusion from local statutes. Carlon's main witness, its former Vice President of Industry Affairs, H. F. van der Voort, testified that by virtue of inclusion in the

NEC a manufacturer's product is essentially approved into law in a number of jurisdictions nationwide (Tr. 286-87). He agreed with the court's observation that it is not simply the existence of the NEC, but the widespread reliance on it by state and local governments, that gives the NEC its bite (Tr. 292; *see also* Tr. 904, 990, 992).[5]

In sum, throughout the liability phase of the trial, the district court's early characterization of Carlon's claim remained accurate:

> It seems to be very much conceded in this case that whatever the NFPA does, the state codes will probably incorporate. That is the predicate for [Carlon's] claim of competitive damage. . . .

(Tr. March 4, 1985 at 6). No other theory of liability was ever presented to the jury.

Allied defended on a number of grounds. It did not dispute that it had engaged in an all-out effort to oppose Carlon's product within the NFPA because the NEC is virtually the exclusive basis for governmental regulation of electrical installations within the United States. Instead, its answer asserted that its actions concerning the 1981 NEC "constituted valid lobbying activity" protected under the doctrine of *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) (J.A. 19).

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5 To like effect, the Glossary and Undisputed Facts, a stipulated joint exhibit, states (A. 1557):

> While the NEC is not itself legally operative, its provisions, in whole or in part, form the basis for a significant number of state and local statutes and ordinances regulating electrical installations throughout the country. . . . Because many state and local governmental code authorities rely on the standards established by the NFPA in the NEC, it is necessary that a firm seeking to market a new electrical product covered by the NEC, such as electrical conduit, obtain approval for the product in the NEC.

Allied also asserted, *inter alia*, that its activities were protected under the First Amendment to the Constitution; were based on a good-faith, well founded belief that ENMT in fact constitutes a danger to the public; were intended to make certain the NFPA considered toxicity in connection with Article 331 and other code provisions; and were in conformance with the NFPA's by-laws, standards and procedures (J.A. 18-19). Among other affirmative defenses, Allied asserted that its actions and the alleged conspiracy had not proximately caused any injury to Carlon; any harm to Carlon resulted from the enactment of the NEC by state and local legislatures (J.A. 21).

At the end of the five-week trial on liability, the jury was asked to respond to eleven questions.[6] Its specific findings of fact, as distinguished from its conclusions, were as follows:

- Allied had a genuine belief as of May, 1980 that electrical nonmetallic tubing was unsafe (J.A. 23).
- In opposing Article 331, Allied acted at least in part on its belief that ENMT was unsafe (J.A. 23).
- Allied's conduct did not violate any of the rules or regulations of the NFPA (J.A. 24).
- The NFPA membership vote did not effectively determine whether Article 331 would be excluded from the Code (J.A. 24).
- The NFPA rules and regulations were fair in that they provided a full and effective appeal from the vote of the membership (J.A. 24).
- Allied's conduct did not deprive Carlon of full and effective access to the NFPA (J.A. 24).

In addition, the parties had agreed that the "exclusion of PVC conduit from the 1981 NEC was supported by objective scientific evidence" (Pet. App. 22a).

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6 A twelfth question "Was Allied genuinely attempting to influence the NFPA in opposing Article 331?" (J.A. 23) was taken from the jury after Carlon conceded that there was no question that Allied had genuinely attempted to influence the NFPA (Tr. 2231-32).

The jury's other findings were that Allied's conduct was "a substantial or material factor in excluding Article 331 from the 1981 NEC" (J.A. 24), "subvert[ed] the consensus standard making process of the NFPA" (*id.*), did not "constitute the least restrictive means of effectively expressing Allied's opposition to the use of ENMT in the marketplace" (J.A. 25), "adversely impact[ed] competition" (*id.*), and "constitute[d] an unreasonable restraint of trade in violation of the antitrust laws" (*id.*).

B. *The Calculation of Damages*

After the verdict on liability, the trial resumed on the issue of money damages. Carlon's opening in this second and discrete phase of the trial sounded an added theme that had not appeared during the weeks of trial on liability: Money damages were now claimed by Carlon not only because Article 331 had been defeated in the NEC and thus in local statutes, but also because Allied had "been using the defeat . . . as a marketing tool" (Tr. 2294-95).

Allied's counsel objected immediately (*id.*):

> MR. WRIGHT [counsel for Allied]: If your Honor please, that's not part of this case. There is no claim in this case that what Allied did after May of 1980 is in any sense illegal. . . .
>
> THE COURT: No, I don't think there is any claim it is illegal, but I think the argument is to the extent at which it impacts upon your damages.
>
> Isn't that your argument?
>
> MR. SACKS [counsel for Carlon]: Yes.

After further colloquy, counsel for Carlon stated that the discrete damages claim it now raised "ha[d] no *Noerr* implications" (Tr. 2313). The trial judge then ruled that Carlon would be permitted to introduce evidence of post-May 1980 activities which "marketed the defeat" before the NEC, noting that "damages can be based only upon conduct which is legal if that

conduct tends to exacerbate the consequences of an illegal conduct" (Tr. 2319).

Carlon's specific evidence to support its claim that Allied "marketed the defeat" was negligible and consisted largely of evidence that Allied sought to organize public support for legislation concerning toxicity (Tr. 2951, 2981-83, 2991-92, 3186-88).

The jury awarded Carlon $3.8 million, to be trebled, plus attorneys' fees (A. 4740).

III. The Judgment Notwithstanding the Verdict

Allied moved to set aside the verdict primarily on the ground that its conduct in connection with the 1981 NEC was protected from antitrust liability under the *Noerr-Pennington* doctrine.

During argument on the post-trial motion, Carlon claimed for the first time that *Noerr-Pennington* was not controlling because its damages flowed not from its exclusion from the NEC and statutes but from Allied's "marketing" of the NFPA's rejection of Article 331. In a lengthy colloquy (Tr. June 27, 1986 at 41-46), the court rejected that argument as a "distortion" ("[t]hat is not the case I remember trying," *id.* at 43) and concluded (*id.* at 44):

> The computation of damages is one thing and causation is another. I don't think you ever retreated from your notion that your damages were caused by the nonadoption of your product by the state legislature.

The district court granted Allied's motion, holding that the *Noerr-Pennington* doctrine applies to conduct outside the legislative halls and is not limited to direct acts of petitioning the government. The court observed that Allied's activity within the NFPA was closer to the legislative process than the public relations campaign protected in *Noerr*. The code adopted by the NFPA, the court noted, "will almost inescapably be followed by the legislatures of the various states. . . . [T]he

decision of the NFPA will be largely determinative of what the legislatures do" (Pet. App. 25a-26a).

The district court rejected Carlon's argument that Allied's conduct was so "reprehensible" and "outrageous" as to lose *Noerr-Pennington* protection. That activity was held to be "so much a part of the traditional democratic process at every level of our society, from the local club right through the Congress itself," that it could not be deemed to be "so outrageous in and of itself so as to be unprotected" (Pet. App. 26a-27a). Carlon had the "same opportunity to advocate its position before the NFPA" and "clearly [was] not excluded from that process in any way" (Pet. App. 30a).

The district court also found "absolutely no basis to apply the sham exception to the Noerr-Pennington doctrine [as there was] a genuine attempt to influence a legislative body arising out of a genuine concern for safety, and, concededly, a factual basis for that concern" (Pet. App. 28a).

Finally, the district court found that Carlon's injury, according to its own theory of the case, flowed solely from the action of state legislatures in enacting the NEC, which excluded ENMT (Pet. App. 29a-30a, 31a-32a).

IV. The Court of Appeals Decision

As primary grounds for reversal, the court of appeals held *Noerr-Pennington* inapplicable to activities within a private code-making body like the NFPA notwithstanding that the goal of these activities is adoption of the NEC as legislation throughout the nation. In so holding, the court acknowledged, it disagreed with three district courts elsewhere as well as Judge Sprizzo in this case (Pet. App. 12a).

The court of appeals found a vital distinction between "the submission of a group's recommendations to the government," which it deemed to be protected conduct, and "the antecedent conduct which generated those recommendations," which is not protected (*id.* at 17a). In a footnote, the court recognized that under *Parker v. Brown*, 317 U.S. 341 (1943), Carlon could not recover "for any injury arising from the adoption of the

NEC by the various governments" (*id.* at 9a n.3). It concluded, however, that Allied's conduct had "caused independent antitrust injury to Carlon"—that is, injury apart from the exclusion by state legislatures—which "should not be excused merely because its actions also indirectly influenced state and local governments" (*id.* at 17a).

INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals held in this case that lobbying to influence the content of a model electrical code relied upon and adopted by most states and municipalities violated the Sherman Act and warranted a judgment for treble damages. The decision is at war with this Court's long-settled holding that "no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws." *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961).

The conduct of Allied challenged in this case was not price-fixing. It was not a group boycott. It was not the use of market power at all. Allied was sued only because it successfully marshalled *political* power, acting within the NFPA's rules to lobby and "get out the vote" in the NFPA code-making process. Its objective was to deny legislative sanction to a product that it genuinely believed to be unsafe, relying on independent scientific evidence. Respondent had a full and fair opportunity to mount a campaign of its own and now seeks indemnity in the antitrust laws for its political defeat. The antitrust laws have no application to this kind of attempt to influence the legislative process.

I. On the main issue, the Second Circuit's broad decision that *Noerr-Pennington* has no application here rests upon two patent misconceptions: first, that this Court's decision in *Noerr* does not protect lobbying activities that are meant to influence legislation only "indirectly"; second, that Allied's lobbying tactics were somehow fundamentally different from those of the *Noerr* defendants because a jury had labeled them

"subversive". *Noerr* itself dealt with lobbying activities that were more indirect—more remote from the operative legislative forum and from the lobbyists' specific legislative goals—and more aggressive, indeed more unethical, than Allied's conduct. The Second Circuit simply misreads *Noerr* and has erred in its conclusion that Allied's indirect lobbying of state and local governments through the NFPA code-making process and its aggressive tactics rendered the *Noerr* doctrine wholly inapplicable.

The notion that Allied should be punished under the Sherman Act for "subversion" of the NFPA's meeting process gives juries an intolerably vague power to regulate associational conduct, misconceives the nature of this political activity, and stretches antitrust prohibitions beyond permissible limits. Allied violated no rules. It deceived no one. It acted in the public interest as well as its self-interest, seeking to deny legislative sanction for a product that it, as well as many disinterested and authoritative experts, believed to be dangerous to public health and safety. There was nothing in this approaching the "vicious, corrupt, and fraudulent" actions found in *Noerr* to be shielded against Sherman Act attack.

In its actions in the NFPA, Allied was exercising its First Amendment rights of association, speech, and petitioning of government. The decision below misapprehends the basic character of this activity, and in the process threatens to impair the crucial role of private code-making bodies in the modern legislative process. State and local governments, which have limited resources and expertise, rely heavily upon model codes drafted by such organizations. The possibility of treble-damage antitrust liability will chill participation in code-making, interfering with the First Amendment rights of industry participants and depriving the states of the benefits of robust and wide-open debate in the formulation of model codes.

Seemingly not reached below, but fallacious in any case, was Carlon's argument that Allied's actions are within the *Noerr* exception for "sham" campaigns to influence legislation. There was nothing "sham" about these actions. Indeed, Carlon explicitly abandoned any pretended issue as to the genuineness

of Allied's pursuit of legislation. It was the very success of this pursuit that led to Carlon's lawsuit seeking Sherman Act damages for the legislative exclusion of ENMT.

II. That Carlon in fact sought damages from Allied for injuries caused by legislative enactments leads to the cognate barrier of *Parker v. Brown*, 317 U.S. 341 (1943). The only theory in the liability portion of this case was that Carlon was harmed by the adoption of the NEC by various state and local governments. Liability on this ground is foreclosed by *Parker*, which insulates such state action from the Sherman Act. Carlon's alternate theory, raised for the first time after the liability phase of the trial, would hold Allied liable for "marketing" the "stigma" of Carlon's NFPA defeat. But that tenuous afterthought, with no substantial support in the record, is also barred by *Noerr*, which denies damages for incidental injuries arguably suffered directly by a plaintiff from activities aimed primarily at legislative measures.

III. Quite apart from the *Noerr* doctrine, to hold Allied liable under the Sherman Act for its dissemination of truthful information about the toxicity problems inherent in Carlon's product—the only damage that Carlon now claims to have suffered—would be an unsound and unprecedented extension of the rule of reason. If anything, the dissemination of such truthful information about a product serves consumer welfare, enhances efficiency, and is fundamentally procompetitive. To punish such activity would turn the Sherman Act on its head and vitiate rights of expression protected by the First Amendment.

ARGUMENT

I.

ALLIED'S ACTIONS AIMED AT LEGISLATION EXCLUDING CARLON'S PRODUCT FROM STATE AND MUNICIPAL CODES ARE PROTECTED AGAINST SHERMAN ACT LIABILITY BY THE *NOERR-PENNINGTON* DOCTRINE

The decision below rejects sweepingly, and without regard to the specific tactics used by Allied at the May 1980 meeting, the proposition that *Noerr-Pennington* "protects attempts to influence a private standard-setting organization where, as here, governments routinely incorporate that organization's standards into their legal codes" (Pet. App. 3a). The primary issue before the Court is whether the court of appeals erred in holding *Noerr-Pennington* protections inapplicable to such attempts, aimed in this indirect but effective fashion at influencing legislation. This issue is separate from the narrow and, in our submission, relatively simple question whether Allied's lawful but assertedly "subversive" actions at the NFPA meeting trigger the so-called "sham" exception to *Noerr-Pennington*.

The Second Circuit's opinion obscures this critical distinction at one point by declaring that "Allied's conduct did not constitute petitioning of the government within the meaning of *Noerr-Pennington*; rather, its conduct was a subversion of the legitimate purposes of NFPA" (Pet. App. 17a). The Ninth Circuit has noted that this language improperly "conflate[s]" the two separate issues presented by the case. *Sessions Tank Liners, Inc. v. Joor Mfg., Inc.*, 827 F.2d 458, 465 (9th Cir. 1987).

The remainder of the opinion below nevertheless reflects that the Second Circuit's holding is broad and not dependent upon any particular findings about Allied's tactics. The court states without qualification that it "decline[s] Allied's invitation to extend *Noerr-Pennington* immunity to lobbying activi-

ties directed toward a 'quasi-legislative' body such as the NFPA" (Pet. App. 12a) and proceeds to elaborate the reasons for that declination (*id.* at 12a-17a). In this light, and in agreement with the analysis of the Ninth Circuit, we argue first, on the threshold question, that *Noerr-Pennington* does immunize Allied's pursuit of legislation through a private code-making organization. We then show that Allied's attempts to influence legislation do not implicate the so-called "sham" exception.

A. The Second Circuit Misconceived the Basic Rationale and Scope of the *Noerr* Doctrine in Holding that Antitrust Liability May Attach for Allied's Political Conduct

The Second Circuit's rejection of *Noerr-Pennington* protection for lobbying directed at quasi-legislative code-making bodies is predicated on an erroneously constricted reading of the doctrine and a series of unsound distinctions. The decision is in conflict with every other court that has addressed the question, including, most recently, the Ninth Circuit. *See Se ns*, 827 F.2d at 465-66. It misconceives the explicit rulings in *Noerr* as well as the fundamental principles underlying that decision and its progeny.

The court's approach is skewed from the outset by its premise that the *Noerr-Pennington* doctrine is an "exemption" from the antitrust laws and therefore must be construed narrowly. The *Noerr* opinion made clear that its holding was based not upon an exemption but upon an understanding that the Sherman Act was never meant in the first place to reach efforts, like the ones here, to affect legislation. 365 U.S. at 137-38. *See also* Point III, *infra*. This Court was mindful of the constitutional doubts that would arise from a contrary view. "The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." *Id.* at 138. *See also California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11, 515 (1972).

Other authorities have recognized that *Noerr-Pennington* is a doctrine of construction to be read generously, not an exemption for conduct that otherwise would be within the reach of the antitrust laws. *See* Handler & De Sevo, *The Noerr-Pennington Doctrine and Its Sham Exception*, 6 Cardozo L. Rev. 1, 5 (1984) (hereinafter cited as *Handler*). *See also In re Airport Car Rental Antitrust Litig.*, 521 F. Supp. 568, 575 (N.D. Cal. 1981), *aff'd*, 693 F.2d 84 (9th Cir. 1982). The Second Circuit's misconception on this aspect explains in part its cramped reading of *Noerr-Pennington*.

1. *The* Noerr-Pennington *Doctrine Protects from Antitrust Liability All Genuine Attempts to Influence Governmental Actions*

The "*Noerr-Pennington* doctrine" refers to the trilogy of cases[7] in which the Court held that activities attempting to influence governmental processes are outside the reach of the federal antitrust laws. *Noerr* itself dealt with a "life or death" political battle between trucking and railroad interests over government regulation of the long-distance freight hauling business. 365 U.S. at 128-29. The parties had engaged in a "vicious, corrupt, and fraudulent" campaign that included deceptive efforts to influence public opinion and, through it, legislation. *Id.* at 129. The railroads were accused, *inter alia*, of using the so-called third-party technique, in which propaganda material prepared for and financed by the railroads was made to appear as the spontaneous commentary of disinterested civic groups. *Id.* at 130.

The Court held unanimously that such indirect lobbying was beyond the reach of the Sherman Act, even where its "sole purpose" was to destroy the truckers as competitors, *id.* at 138, and even where "unethical" tactics were employed, *id.* at 141. The Court said that the Sherman Act "condemns trade re-

7 *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

straints, not political activity," *id.* at 140-41, and concluded that where parties "were making a genuine effort to influence legislation and law enforcement practices," and were not engaging in a "mere sham" to cover direct interference with the business relationships of competitors, antitrust liability could not attach, *id.* at 144.

The Court identified two major grounds for its holding. First, *id.* at 136, that the publicity campaign under consideration

> [bore] little if any resemblance to the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements.

This rationale has less to do with the governmental target of lobbying activities than with the nature of the activities themselves; acts of political persuasion do not resemble agreements in restraint of trade.

The second basis for the holding in *Noerr* was the Court's conclusion that imposing antitrust liability on speech and conduct in an economic legislative battle would threaten the right of free speech and the right to petition government embodied in the First Amendment. Starting with the premise that "where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out," *id.* at 136, the Court went on to reason that protecting indirect lobbying was necessary to protect "the power of government to take actions through its legislature and executive that operate to restrain trade," *id.* at 137. The Court continued:

> In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends

> upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act.

Id. Thus, "indirect" no less than "direct" attempts to lobby the legislature must be deemed beyond the reach of the Sherman Act. *Id.* at 137-41.

In *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), the Court extended *Noerr* to attempts to influence the executive branch. The principles of *Noerr* were there applied to protect efforts by mine owners and union officials to squeeze out small coal producers by pressing the Secretary of Labor to raise minimum wage levels. The Court held that "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." *Id.* at 670. Finally, in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), the Court extended *Noerr* to administrative and adjudicative proceedings, making clear that the doctrine was firmly rooted in the First Amendment. *Id.* at 510-12.

The *Noerr-Pennington* doctrine is a logical adjunct to the holding of *Parker v. Brown*, 317 U.S. 341 (1943), that the Sherman Act does not apply to governmental action that results in a restraint of trade. The Court found "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Id.* at 350-51.

The Court recently extended the *Parker* doctrine to apply to action taken by "committees, commissions, or others who necessarily must advise the sovereign," because any other holding "would emasculate the *Parker v. Brown* doctrine." *Hoover v. Ronwin*, 466 U.S. 558, 580 (1984). *Noerr-Pennington* builds upon this concern by providing further

protection for speech aimed at influencing governmental action.

Such protection can be seen as necessary to preserve the flow of information to government and hence to protect the power to act under *Parker*. But the doctrine can also be seen as a recognition that when private parties have persuaded a government to act in a certain way, "the government's decision to act reflects an independent governmental choice, constituting a supervening 'cause' that breaks the link between the private party's request and the plaintiff's injury." P. Areeda & D. Turner, *Antitrust Law*, ¶ 201, at 4 (Supp. 1986) (hereinafter cited as *Antitrust Law*). *See also Airport Car Rental Litig.*, 521 F. Supp. at 574 (where defendants try to influence airport authorities to exclude plaintiff from the on-airport market, any restraint flows only from the action of airport authorities).

Every federal court that has addressed the question, except the Second Circuit in this case, has held that the *Noerr-Pennington* doctrine applies to efforts to lobby a private code-making body where the ultimate goal is to influence state legislatures that will rely upon the final code. This application is necessary to protect both the right to petition government and the values of participatory democracy underlying *Noerr-Pennington*.

Most recently, the Ninth Circuit found that *Noerr-Pennington* applied on facts remarkably similar to those in the present case. In the *Sessions* case, Joor, a manufacturer of new metal tanks, successfully lobbied the Western Fire Chiefs Association ("WFCA") to exclude from the Uniform Fire Code ("UFC") a process of repairing old tanks employed by Sessions, a competitor. The WFCA, like the NFPA, is a non-profit, voluntary private membership organization with no governmental status. The UFC, which it promulgates, has no legal effect until it is adopted by state and local governments. 827 F.2d at 460-61. For *Noerr* purposes, therefore, the organization and its code were identical to those in the present case.

The lobbying conducted in *Sessions* was, if anything, more aggressive than that of Allied in this case. Joor's president became a member of the WFCA subcommittee considering the

question, giving him special power over the proposal denied to Sessions. In addition, under allegations taken as true for summary judgment purposes, Joor misrepresented critical facts in its presentation to WFCA and in effect bribed various fire chiefs who were influential in the code-making process. *Id.* at 461.

The Ninth Circuit nevertheless decided that this conduct was covered by *Noerr-Pennington*, and emphasized three grounds for its holding that the doctrine "immunizes proper lobbying—either singly or in combination with others—of a private association engaged in promulgating an important model code to influence legislative and executive decisions."[8] *Id.* at 462. First, the court relied upon the right to petition, which "is not confined to entreating the government directly for relief." *Id.* The court stressed that *Noerr* itself had concerned indirect pressure on the legislature through the manipulation of public opinion. Second, the court noted the importance of code-making organizations in the political process, and the concomitant need to protect the free flow of information to bodies upon which government actors rely. Finally, the court referred to *Noerr*'s narrowing construction of the Sherman Act: "The Sherman Act was not intended to make private parties liable, in the ordinary case, for government acts." *Id.* at 464. In this connection, the court stressed the "proximate cause" aspect of *Noerr-Pennington*, noting that there was no harm to plaintiff until the UFC was adopted by local governments. *Id.*

The *Sessions* court also strongly criticized the holding of the court of appeals in the present case. Noting that the Second Circuit had confused the question of *Noerr-Pennington*'s application with the "sham" inquiry, the court observed that the Second Circuit

8 The court held that Sessions had stated "a limited 'sham' exception claim" only to the extent that Joor was alleged to have made misrepresentations to fire officials acting in an administrative capacity, and remanded for further proceedings on that claim. 827 F.2d at 468. The court noted in this connection that similar misrepresentations in the legislative context would not be actionable under *Noerr-Pennington*. *Id.*

> made no mention at all of [antitrust defendants'] associational rights, which are plainly implicated. More troubling still, the court held that defendant could not try to justify the organization's failure to approve plaintiff's product (which formed the basis of the lawsuit) by showing that plaintiff's product was in fact unsafe. . . . Thus *Indian Head* in effect suggests that defendants may owe treble damages simply for bringing forward undisputed evidence that a rival's product is actually hazardous. The *Noerr* doctrine exists precisely to prohibit such a result.

Id. at 466 n.6.[9] The two district courts in other circuits that have addressed the issue are in accord with the Ninth Circuit.[10]

In support of its contrary position, the Second Circuit found significance in two factors: First, the court held that *Noerr* did not apply because of the NFPA's private status, rendering

9 The *Sessions* court suggested that the Second Circuit could have reached the same result by applying the "sham" exception to *Noerr-Pennington*. As we demonstrate below, *see* pp. 36-38, *infra*, the Ninth Circuit's comment in this connection gives too broad an application to the "sham" exception, and evidently misreads the record in the present case.

10 In *Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit Corp.*, 573 F. Supp. 833 (N.D. Ill. 1983), the court held that *Noerr-Pennington* applied to the same NEC amendment process at issue in this case. The court held that it was irrelevant that the NFPA was not itself a government agency, stressing that "the key factor is the nature of the relationship between the trade association and the governmental bodies." *Id.* at 839. Because of the "great delegation of authority to the NFPA" by local governments throughout the country, lobbying efforts within the organization are protected by the doctrine. *Id.* at 839-40.

Similarly, in *Rush-Hampton Industries, Inc. v. Home Ventilating Institute*, 419 F. Supp. 19 (M.D. Fla. 1976), the court applied *Noerr-Pennington* to lobbying conducted by a trade association before regional organizations that promulgate model building codes and building standards relied upon by state and local entities. The court observed that "approval by one of these organizations is 'tantamount to approval by numerous governmental entities' in its respective region, as the standards and products approved are often adopted by reference from those standards and products already reviewed by the organization." *Id.* at 22-23.

"indirect" Allied's efforts to influence legislation. Second, the court stressed a question-begging conclusion that Allied had an improper motive, its "sole purpose" being to achieve an anticompetitive result through "subver[sive]" means (Pet. App. 21a). Both thoughts are in conflict with *Noerr* itself and with the underlying values of the *Noerr-Pennington* doctrine.

2. *Neither the Private Character of the NFPA nor the "Indirect" Nature of Allied's Lobbying Sustains a Meaningful Distinction of* Noerr-Pennington

In finding Allied's petitioning to be too indirect and remote from the legislative process to be protected, the Second Circuit placed great weight on its distinction between the legislature itself, which "acts in the public interest," and a private organization, whose "agenda often will not coincide with, and may be directly contrary to, the interests of the broader public" (Pet. App. 13a-14a). However, the *Noerr-Pennington* doctrine has never, from the outset, been limited to direct petitioning of government. In *Noerr* itself the petitioning was less direct than in the present case: The public relations campaign there was aimed at the general public, in the hope that public opinion would eventually filter back to Congress. 365 U.S. at 131. In this case, Allied's lobbying efforts were more narrowly focused on the specific body, the NFPA, whose decision would directly influence the actions of local governments. In both cases, private parties were the immediate targets of the lobbying activity; the effect on government actors was in both cases "indirect."

The Second Circuit acknowledged this difficulty when it noted Allied's contention that *Noerr* "authoritatively abolishes any distinction between 'direct' and 'indirect' petitioning" (Pet. App. 19a). The court never really faced the question, however, merely declaring that unlike the railroads in *Noerr*, "Allied cannot similarly claim that its conduct constituted 'political activity' conducted within the 'political arena' " (*id*).

But that is precisely Allied's claim. In its activities within the NFPA, Allied engaged in the kind of political conduct that *Noerr* protects. It was attempting to influence a private group

whose decision would and undisputedly did have direct and decisive influence upon state and local governments. Allied's actions, whatever its motives and whatever tactics it employed, were political advocacy, not the abuse of market power in restraint of trade. What it sought, and achieved, was a particular legislative result.

The key question is not whether the petitioning activity is direct or indirect; it is whether a party is genuinely petitioning at all—whether the party's actions are indeed meant to influence ensuing legislation. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 914 (1982); *see also Federal Prescription Serv., Inc. v. American Pharmaceutical Ass'n*, 471 F. Supp. 126, 130 (D.D.C. 1979), *aff'd*, 663 F.2d 253 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982). Here, of course, there was never any question that Allied's political activity in the NFPA was aimed at achieving a legislatively mandated exclusion of Carlon's product from the market. Carlon's essential complaint was that Allied succeeded.

The distinction drawn by the court of appeals between direct and indirect influence upon legislation is neither realistic in fact nor sound in law. The record makes clear that the effective route to Allied's goal was via the NFPA. In the words of the opinion below, the NEC is "the most widely disseminated and adopted model code in the world" (Pet. App. 4a). Efforts directly to lobby local governments, which lack the resources to study closely or second-guess the recommendations of the NFPA, would be largely futile. The NEC is adopted with few or no changes by the vast majority of states and a host of municipalities. As the district court found, parties seeking to be heard with respect to the NEC must join the political process at the NFPA (Pet. App. 25a.-26a).[11] The road to Albany, Phoenix and Sacramento begins at the NFPA. That Allied might have chosen the tardy and less effective course of lobbying directly the various legislative bodies that enacted the

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11 *Accord Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit Corp.*, 573 F. Supp. 833, 838 (N.D. Ill. 1983).

NEC—an alternative the court of appeals deems the only protected one—is at best irrelevant under *Noerr*.

In support of the proposition that only direct petitions to government and not antecedent acts are protected (Pet. App. 17a), the court cited a string of inapposite cases, each of which dealt with price-fixing agreements, group boycotts, or some other direct action in restraint of trade undertaken by groups of private market participants. These cases stand only for the proposition that such agreements in restraint of trade do not become protected simply because they may eventually be reviewed or ratified by a government agency.[12]

Feminist Women's Health Center, Inc. v. Mohammad, 586 F.2d 530 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979), upon which the Second Circuit placed special reliance, is notably beside the point. In that case, the Fifth Circuit held that the collective effort of a private group of doctors to discourage professional affiliation with a private abortion clinic was not protected by *Noerr-Pennington* except to the extent that the doctors had actually petitioned the Florida Board of Medical Examiners, a state-created entity. *Id.* at 542-43. The court did not reject the theory upon which *Noerr-Pennington* protects Allied here. It simply held that neither the OB-GYN staffs of private hospitals nor a private medical association that had also been "petition[ed]" were sufficiently related to a government body to invoke *Noerr*, and that the doctors therefore were not engaged in petitioning government at all, directly or indirectly. *Id.* at 543-45. The harm in *Mohammad* flowed from the actions of the private organization, with no significant restraint being caused by any governmental body. *Id.* at 535-39.[13]

12 *See, e.g., United States v. Southern Motor Carriers Rate Conference, Inc.*, 702 F.2d 532 (5th Cir. 1983) (private agreements to fix rates), *reaffirming en banc* 672 F.2d 469 (5th Cir. 1982), *rev'd on other grounds*, 471 U S. 48 (1985); *Litton Systems, Inc. v. American Telephone & Telegraph Co.*, 700 F.2d 785 (2d Cir. 1983) (imposition of private tariffs and the requirement of an unnecessary interface device), *cert. denied*, 464 U.S. 1073 (1984); *Feminist Women's Health Center, Inc. v. Mohammad*, 586 F.2d 530 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979).

3. *The Second Circuit Improperly Based Its Holding in Large Part on the Jury's Nebulous "Subversion" Finding*

The court of appeals appears to have arrived at its categorical holding against *Noerr* protection primarily on its assumption that Allied's motivation was solely to restrain trade and that it did so through "subversion" of the NFPA's rule-making process. "[W]e conclude that Allied's 'ballot stuffing'—a subversion of the NFPA code-making process—should not be deemed governmental petitioning" (Pet. App. 12a). In so holding, the Court confused the primary question before it, whether *Noerr-Pennington* applied at all, with the second, narrower question, whether the "sham" exception was triggered on the specific facts of this case. *Sessions*, 827 F.2d at 465. The court also failed to consider the unacceptable vagueness, approaching meaninglessness, of the subversion finding.

There was no instruction to the jury as to what "subversion" could—or could not—mean in this setting. Whatever "subversion" meant, the jury was allowed to find it while explicitly determining that (1) Allied did not violate any of the rules or regulations of the NFPA in pursuing its genuine belief that ENMT was unsafe; (2) the NFPA rules and regulations were fair in that they provided a full and effective appeal from the vote of the membership; and (3) Allied's conduct did not deprive Carlon of full and effective access to the NFPA (J.A. 23-24).

Allied's "packing" of the NFPA meeting, the presumptive basis for the jury's finding of "subversion," is irrelevant to the question whether *Noerr* applies to lobbying an agency like the NFPA. It makes no difference under *Noerr* or for Sherman Act purposes generally that the jury accepted the invitation to

13 *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982), also cited by the court below, in no way supports the Second Circuit's holding. As the district court noted, the *Noerr-Pennington* doctrine was never even raised in *Hydrolevel* (Pet. App. 29a).

find that Allied's conduct at the May 20 meeting "subverted" the NFPA process. There was no tenable meaning on which the jury could have been permitted to transmute Allied's admittedly crude tactic, found by the jury to be in conformity with the NFPA rules and equally available to Carlon, into a Sherman Act violation.

On the contrary, to fashion sanctions on such a theory moves unacceptably toward restricting on grounds of taste or caprice "the practice of persons sharing common views banding together to achieve a common end"—a practice "deeply embedded in the American political process." *Citizens Against Rent Control/Coalition For Fair Housing v. City of Berkeley*, 454 U.S. 290, 294 (1981).[14]

The Court's opinion in *Noerr* is again instructive. It expressly rejected the argument that the railroads' attempts indirectly to influence the legislature were unprotected because they employed dishonest or unethical tactics. 365 U.S. at 140. Even a campaign that was " 'vicious, corrupt, and fraudulent' " was deemed protected. *Id.* at 129. As the Court ruled, dishonest tactics, including outright misrepresentations, are not grounds for punishing lobbying activity under the Sherman Act. *See Antitrust Law*, ¶ 204.1c, at 45-46 (Supp. 1986); *Handler* at 18.[15]

This Court in *Noerr* rejected a far stronger variant of the "subversion" argument adopted by the court of appeals in this case. The railroads in *Noerr* used the so-called third-party

14 As the cited case reminds us, limiting how much people may give or what they may do to bring their associations to support their interests is a highly sensitive subject under the First Amendment, quite without regard to special doctrines like *Noerr-Pennington*. Even if some people were brought to support associational goals by "intimidation" or "threats," this could not be a ground of proximately caused damages and recovery consistent with the rights assured by the First Amendment. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 921-22 (1982).

15 *See also Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220, 228 (7th Cir. 1975) ("When concerted activities occur in a legislative or other non-adjudicatory governmental setting, they are not within the Sherman Act even though they include 'conduct that can be termed unethical,' such as deception and misrepresentation." (citation omitted)).

technique, in which publicity material prepared for the railroads was circulated as if it had been generated spontaneously by citizens and civic groups. 365 U.S. at 129-30. Members of the public, through whom the railroads hoped to influence the legislature, were thereby deceived into thinking that the anti-trucking arguments had come from objective third parties. As vigorously argued in the brief for the trucking interests in *Noerr*, the railroads "worked behind the scenes with government officials, succeeding even in getting their statistics, loaded against the trucking industry, before the Governor of Pennsylvania and his Secretary of Highways, in the guise of a report of the assistant chief engineer of the Department of Highways." Brief for Respondents at 15-16, *Noerr* (No. 60-50). Furthermore, the railroads "engaged in active deception and fraud, *misrepresenting* themselves as the Grange, the Township Supervisors, automobile clubs, and even the Bureau of Public Roads of the State of Ohio." *Id.* at 20 (emphasis in original). The brief concluded: "Far from being privileged, petitioners' technique to procure legislation by misrepresentation of their true connection, has been held to be against public policy and illegal." *Id.* at 21-22.

This Court agreed that the third-party technique used by the railroads fell "far short of the ethical standards generally approved in this country." *Noerr*, 365 U.S. at 140. Clearly, a jury might well have found the railroads' campaign "subversive" of democratic processes in ways far more fundamental than Allied's get-out-the-vote campaign. Nevertheless, the Court rejected the truckers' argument, noting that the Sherman Act does not establish a general code of business ethics:

> Insofar as that Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity. . . . The proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena. Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of this

> Court interpreting such legislation. All of this caution would go for naught if we permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial impact and involve conduct that can be termed unethical.

Id. at 140-41 (footnote omitted). The reasoning there, rejecting Sherman Act liability for political "conduct that can be termed unethical," applies with at least equal force to lawful conduct that a jury instructed in vague terms found appropriate to label "subversive."[16]

The constitutional component of the *Noerr-Pennington* doctrine protecting the people's right to petition, *id.* at 139, excludes from this setting vague notions of "ethics" or propriety in the lobbying process. That is not to say there is no basis for the Second Circuit's concern about potential abuse of that process. Whenever vigorous advocacy is permitted, the possibility of distortion and unfairness exists. Parties with a pecuniary interest in a particular issue have a motive to skew the debate in their direction. But, as *Noerr* tells us, these are risks that must be borne in an open and democratic society. *Id.* Certainly, if there is to be regulation of the lobbying process, it ought not to be through imposition of treble-damage Sherman Act liability on the basis of a jury's sense of appropriate etiquette in the political arena as measured by some hazy subversion standard. Jurors, like judges, are without such power; as is true for joint venturers and code-making groups alike, "the antitrust laws do not themselves impose . . . a requirement of process." *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 293 (1985).

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16 In addition, the Second Circuit's statement that Allied's "sole purpose" in lobbying the NFPA was "achieving an anti-competitive result" (Pet. App. 21a) is both legally irrelevant and factually incorrect. *Noerr* itself stressed that pecuniary motivation does not make lobbying activity a Sherman Act violation, since people with "a hope of personal advantage . . . provide much of the information upon which governments must act." 365 U.S. at 139. And the jury in this case specifically found that Allied acted at least in part upon its genuine belief that ENMT was unsafe (J.A. 24).

B. The Decision Below Would Stifle Uninhibited Debate in the Model Code Process And Would Interfere With Useful And Desirable Code-Making Activity

The opinion below severely undervalues the role of code-making bodies in the political process, and wrongly ignores the chilling effect that imposing liability in these circumstances will have on code-making activities. Private standard-setting bodies have assumed an increasingly important role in the legislative process through the promulgation of model codes. The parties who have the most to contribute to this process—members of the affected industries—are often those with significant degrees of self-interest. If these parties are not protected in their efforts vigorously to influence the code-making process, their involvement will be curtailed or entirely deterred by the prospect of treble-damage liability.[17]

The important role of organized interest groups in American politics has been recognized from our earliest history. More than 150 years ago, Alexis de Tocqueville observed:

> As soon as several of the inhabitants of the United States have taken up an opinion or a feeling which they wish to promote in the world, they look out for mutual assistance; and as soon as they have found one another out, they combine. From that moment they are no longer isolated men, but a power seen from afar, whose actions serve for an example and whose language is listened to.

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17 Professor Handler is in accord:

> As the Supreme Court recently reminded us, our form of government is predicated on the pluralistic belief that the people will act according to their own self-interest and that "the summation of these individual pursuits will further the collective welfare." In this day of interest-group politics, it is essential that the right to petition to the legislative, executive, administrative, and judicial arms of the government be zealously safeguarded.

Handler at 55 (citation omitted).

2 *Democracy in America* 117-18 (P. Bradley rev. ed. 1945). Tocqueville recognized that "[i]n the United States associations are established to promote the public safety, commerce, industry, morality, and religion. There is no end which the human will despairs of attaining through the combined power of individuals united into a society." 1 *id.* at 199.

One of the primary purposes for which Americans form associations is to influence the passage of laws, as this Court recognized in *Noerr*, 365 U.S. at 139. This Court also found that interest groups use a variety of direct and indirect methods to achieve this purpose. The railroads' campaign to influence Congress embraced not just direct lobbying but also "[c]irculars, speeches, newspaper articles, editorials, magazine articles, [and] memoranda." 365 U.S. at 142.

In the years since *Noerr*, the importance of indirect methods of lobbying has grown. Political scientists have observed the development of the "grass roots" technique of lobbying, which uses a variety of methods to generate public pressure for or against legislation. As one scholar has noted:

> Lobbying at the grass roots assumes that legislators are particularly responsive to public opinion. Direct lobbying becomes much more effective when it is supported by an articulate public. Without it . . . direct lobbying—the personal contacting of legislators by lobbyists—tends to be ineffective except on narrow issues.

A. Holtzman, *Interest Groups and Lobbying* 100 (1966). The techniques of indirect grass roots lobbying include mass letter-writing, public relations and media campaigns, and obtaining testimony and involvement in the lobbying process by non-lobbyist constituents. *Id.* at 101-07. *See also* G. Wilson, *Interest Groups in the United States* 77, 93-95 (1981); S. Levitan & M. Cooper, *Business Lobbies* 5 (1984).

Trade associations and other coalitions serve the crucial role of "interest aggregation"—creating, through internal bargaining and the winnowing of options, a consensus that can be presented to political decision makers. Costain & Costain, *Interest Groups as Policy Aggregators in the Legislative Process*, 14 Polity 249, 258-59 (1981). Given the limited resources and technical expertise available to state legislatures especially, lobbying groups have long been relied upon both to provide information and to draft legislation. *See* R. Weissberg, *Understanding American Government* 250-52 (Alt. ed. 1981); A. Holtzman, *supra*, at 74-75, 90.

In recent years, the role of industry associations in drafting legislation has been formalized in the code-making process. More than 420 private organizations now participate in promulgating some 32,000 codes and standards. *See* National Bureau of Standards, Special Pub. No. 681, *Standards Activities of Organizations in the United States* 1 (Aug. 1984). State and local governments have come to rely heavily upon such codes, particularly in areas involving complex technical or scientific issues. *See* Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 Tex. L. Rev. 1329, 1377-78 (1978). Voluntary standards are often adopted through statutory " 'incorporation by reference.' " *Id.* at 1386. The federal government also has relied upon the private sector in formulating national standards in such areas as occupational safety, water pollution control, and consumer product safety. *See* Bakke, *Joint Efforts in Developing Standards*, 44 Antitrust L.J. 337, 341-42 (1975).

The Ninth Circuit stressed this vital role of private standard-setting bodies when it held in *Sessions*, 827 F.2d at 463-64 (citation omitted), that *Noerr-Pennington* protected participation in the WFCA's code-making activities:

> Municipal and other local lawmakers rely on the WFCA's investigatory work in approving or disapproving myriad products and safety standards. In many instances it would be either impossible or inefficient for each local government to do otherwise. Most localities lack both the required resources and the talent. At the same time, it also would be inefficient if not impossible for particular businesses effectively to lobby every city or county council that adopts a fire code. . . . It follows that the WFCA

renders valuable civic services and that the information it receives is quite important in the legislative process.

Promulgation of the NEC by the NFPA is a prime example of the importance to local governments of model codes. Twenty-five states and the District of Columbia adopt the NEC verbatim by statutory reference. *See, e.g.*, 41 Ill. Admin. Code tit. 100, § 100.210 (1986); Md. Ann. Code art. 38a, § 60 (1982); N.Y. Exec. Law §§ 370-83 (McKinney 1982). Nineteen more adopt it with amendments, changing an average of only 12 of the 114 articles. As the court below recognized, many local governments also rely heavily upon the NEC, making it the most widely disseminated and adopted model code in the world (Pet. App. 4a-5a n.1).[18]

Oddly, because a standard-setting organization " 'wields great power in the Nation's economy,' " the Second Circuit sought to circumscribe Allied's role within the NFPA (Pet. App. 15a) (quoting *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 566, 570 (1982)). But it is precisely this great power that makes crucial full and unshackled participation in the code-making process. Such participation is at minimum another method of indirect lobbying, analogous to the public relations and media campaigns employed by numerous interest groups to influence legislation indirectly. If anything, it is even closer to the legislative process.

The Second Circuit's position may be expected to deter vigorous advocacy in lobbying and, as a consequence, to impoverish the legislative process. Local governments rely upon robust and wide-open debate to produce the draft codes they adopt. If critics do not speak up for fear of treble-damage liability, the code-making process will lose the spirit of give-and-take necessary to produce the best product. The Second Circuit's application of the Sherman Act actually insulates code-making bodies from public industry criticism, rendering

18 *See also Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit Corp.*, 573 F. Supp. 833, 834 (N.D. Ill. 1983).

the ultimate code less, rather than more, representative of industry-wide sentiments.

The importance of protecting full and vigorous participation in the code-making process was recognized by the district court in this case (Pet. App. 25a-26a). That court also expressed a view of the political process perhaps more pragmatic and realistic than that of the Second Circuit. It found Allied's conduct to be an accepted part of "the traditional democratic process at every level of our society, from the local club right through the Congress itself," and therefore declined to find Allied's action to be "so reprehensible and so outrageous" that it was unprotected by *Noerr-Pennington* (Pet. App. 26a-27a).

Lobbying, mobilizing support, "getting out the vote"—these are the tactics inevitably relied upon to influence legislation. Where such conduct is pursued in conformance with an organization's rules, where access and indeed the use of similar tactics is not denied to opponents, and where the forum employed is functionally the only one in which to have a say in influencing legislation, both the letter and the spirit of the *Noerr-Pennington* doctrine require immunity from antitrust liability. As one distinguished commentary has said:

> The minimum teaching of *Noerr* is that unethical political conduct in the legislative context is irrelevant for antitrust purposes. And that result is reinforced by the recognition that government learns about reality through a complex battle of contending political forces which speak truths, and partial truths, and exert diverse pressures upon various persons and institutions. Society recognizes that politics is often a rough and tumble affair. Many would feel, moreover, that definition and balancing are better left to legislatures, which have more political experience than the courts and which may be better able to appreciate the balance of contending forces.

Antitrust Law, ¶ 204, at 46-47 (1978).

C. *Noerr*'s "Sham" Exception Has No Application Where, As Here, A Defendant Seeks Genuinely to Influence Legislation

Though the point appears not to have been reached by the court of appeals, except possibly in its fleeting reference to "subversion" of the NFPA process, Carlon argued below that the facts of this case bring into play the so-called "sham" exception to the *Noerr-Pennington* doctrine. The Ninth Circuit in its *Sessions* opinion has found this to be a basis for reconciling that case with this one. We undertake to demonstrate here that Allied's undisputedly "genuine" efforts (so stipulated and found by the district court, Pet. App. 26a) to influence the NFPA, predicated on a good-faith belief that Carlon's product was dangerous to life, do not constitute anything like the sham conduct to which the exception relates.

This Court first posited a possible "sham" exception in *Noerr*, 365 U.S. at 144 (emphasis added):

> There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified. But this certainly is not the case here. *No one denies that the railroads were making a genuine effort to influence legislation and law enforcement practices.*

The exception was further refined in *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508, 512 (1971). There, the petitioner, a trucking association, was alleged to have "harass[ed] and deter[red]" another trucking association by instituting state and federal proceedings to resist applications by the respondents to secure operating rights. *Id.* at 511. The petitioner " 'instituted the proceedings and actions . . . with or without probable cause, and regardless of the merits of the cases.' " *Id.* at 512. This harassment was alleged to have denied the plaintiffs "free and unlimited access" to these

administrative and judicial proceedings, with the result that the proceedings were "effectively closed" to them. *Id.* at 511. Because the petitioners were not really trying to use the administrative process, but were merely seeking to harass the respondent and deny it access to the process, this Court concluded that the complaint established a basis for applying the "sham" exception.

Taken together, these and later decisions of the lower courts establish that a sham "is the improper invocation of governmental machinery in order to injure a rival by the invocation itself and without expectation of obtaining a favorable governmental decision." *Antitrust Law*, ¶ 203.1c, at 10 (Supp. 1986). Whether there is a sham depends on whether "the efforts to influence legislation, or otherwise to obtain governmental action, were genuine and not a mere cover or camouflage for a concerted program to harm competitors." *Handler* at 8.

When the *Noerr-Pennington* doctrine is invoked in cases involving legislative petitioning, the sham exception will virtually never apply. *Id.* at 18; *Antitrust Law*, ¶ 203.1c, at 11 (Supp. 1986). Professors Areeda and Turner argue that to prevail a plaintiff must demonstrate that the lobbying was conducted without even a slight expectation of achieving the desired legislative result—a condition that will almost never obtain in the real world. Further, if the lobbying indeed stood no chance of success, the plaintiff would have no need to respond, and would not be injured. "Thus, about the only evidence that would demonstrate impropriety would be the speaker's own admission that his lobbying efforts were undertaken in bad faith." *Id.*, ¶ 203a, at 40 (1978).

That analysis is borne out at least in part by the fact that since the sham exception was formulated, only some twenty sham cases have concerned claims based upon petitioning the legislature, and in not one of these has the challenged conduct been found to be a sham. *Handler* at 18.

Carlon has made no showing that would permit the extraordinary application of the sham doctrine to this case. The record and jury findings preclude that. Allied had a genuine belief that ENMT was unsafe and acted at least in part on that

belief in seeking to influence the legislative process by opposing Article 331 within the NFPA (J.A. 23). Moreover, Allied was successful in obtaining the legislative result it sought. That alone is enough. *See Antitrust Law*, ¶ 203a at 10 (Supp. 1986).

On these facts, neither court below found Allied's conduct to be sham.[19] Nor does the "subversion" finding provide a basis for applying the "sham" exception in the legislative lobbying context, any more than did the railroads' unethical conduct in *Noerr*. *See* pp. 27-30, *supra*. The decisive point remains that Allied's aim, which it achieved, was to obtain favorable legislation, and that Allied in no way excluded Carlon from the legislative process.

II.

NOERR AND *PARKER*, READ TOGETHER, BAR THE THEORY OF LIABILITY RELIED UPON BY THE SECOND CIRCUIT

The court of appeals recognized that under the doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), Carlon could seek no redress for any injury arising directly from the adoption of the NEC by various state and local governments (Pet. App. 9a n.3). The court nevertheless imposed liability upon Allied on the basis of "stigma" allegedly suffered by Carlon because of

19 As the district court concluded (Pet. App. 26a):

> There can't be any question that the attempt on the part of Allied to influence the various state legislatures through the NFPA was a genuine attempt to influence legislative action. All of those cases which have found that Noerr-Pennington does not apply involve situations where it was clear that the defendant was not genuinely intending to influence legislative or official action, but was merely indulging in a posture or a sham that was designed solely to effectuate their anticompetitive purpose. Here there is no question that defendant genuinely intended to influence legislative action through the NFPA. That was never in dispute. Moreover, the jury found Allied had a genuine concern for safety and plaintiff has conceded that there is a factual basis for that concern.

ENMT'S exclusion from the 1981 NEC and Allied's "marketing" of that stigma (*id.* at 9a).[20]

The court's holding is supported by neither the record nor the law. Carlon tried its liability case solely on the theory that it had been harmed because the NEC had been adopted by the states. Only after the jury returned a verdict on this theory did Carlon attempt to introduce the "stigma" theory into the case, seeking to avoid the *Parker* and *Noerr* problems inherent in its claim. The district court rejected Carlon's attempt retroactively to establish liability on this new theory; the adoption of the theory by the court of appeals cannot obscure that there is no basis for liability that is not barred by either *Noerr* or *Parker* or both. The two cases confront Carlon with an inescapable dilemma.

A. The Liability Theory Actually Tried Below Is Barred Under *Parker*

The complaint in this case, which was never amended, contains no intimation of the "stigma" theory. Instead, it is based entirely on the theory that Carlon's antitrust injury was proximately caused by the NEC's adoption by state and local governments. Complaint paras. 13, 30-32 (J.A. 7, 13-14). As we have shown, *see* pp. 7-8, 10-11, *supra*, this is the *only* theory for liability that was offered until the June 27, 1986, post-trial hearing, at which Carlon for the first time raised the "stigma" argument in urging the trial court not to apply the *Noerr-Pennington* doctrine. The district judge rejected this new theory as a "distortion" of what had been presented to the jury and plaintiff essentially conceded that the "stigma" theory had been developed only when it became clear that *Noerr* would bar recovery on the original theory (Tr. June 27, 1986 at 42-43).

20 The court of appeals also found that Allied did not challenge "the correctness of" or "the *foundation for*" damages based on the stigma (Pet. App. 9a n.3) (emphasis added). In fact, Allied did object, loudly and clearly, to the introduction of this new, baseless theory, both before the district court (Tr. 2294-95) and before the court of appeals. *See* Brief in the Court of Appeals of Defendant-Appellee-Cross-Appellant at 9-10.

Without laboring the details of the transcript, it is decisive and undisputed that the "stigma" theory was never argued during the *liability* phase of the trial. The only theory underlying the jury's liability verdict was the direct harm caused to Carlon by the adoption of the NEC by various state and local governments. Such liability, however, is clearly barred by the rule of *Parker*, which precludes Sherman Act recovery for trade restraints imposed by legislative enactments.

The *Parker* doctrine has been broadly construed to protect the state's right to restrain trade in exercising its regulatory authority, even when the state acts through nongovernmental parties as its agents. In *Hoover v. Ronwin*, 466 U.S. 558, 580 (1984), this Court rejected reasoning that

> would allow Sherman Act plaintiffs to look behind the actions of state sovereigns and base their claims on perceived conspiracies to restrain trade among the committees, commissions, or others who necessarily must advise the sovereign. Such a holding would emasculate the *Parker v. Brown* doctrine. For example, if a state legislature enacted a law based on studies performed, or advice given, by an advisory committee, the dissent would find the State exempt from Sherman Act liability but not the committee. A party dissatisfied with the new law could circumvent the state-action doctrine by alleging that the committee's advice reflected an undisclosed collective desire to restrain trade without the knowledge of the legislature. The plaintiff certainly would survive a motion to dismiss—or even summary judgment—despite the fact that the suit falls squarely within the class of cases found exempt from Sherman Act liability in *Parker*.

Those conclusions apply *a fortiori* to this case, where the claimed cause of direct injury was legislative action by the states and municipalities, not the "antecedent" actions in and by the NFPA (Pet. App. 17a).

The actions of Allied in the NFPA did not in themselves have any anticompetitive effect. The injury to Carlon, if any, was caused by the adoption of the NEC by various state

legislatures and under *Parker* there can be no antitrust claim for such harm. If Allied's lobbying efforts had been unsuccessful in obtaining state legislation, there would have been no harm to Carlon. *See Antitrust Law*, ¶ 204d, at 49 (1978). Either way, Carlon's theory of liability would fail because Allied did not proximately cause any injury.

B. If There Were Incidental "Direct" Injuries, Recovery for Them Is Barred by *Noerr*

The complaining truckers in *Noerr* sought to counter the railroads' reliance upon their antitrust immunity in seeking legislation by arguing that they had been "directly" injured as a result of public deceptions including notably the "third-party" technique. As the truckers stated their case:

> The unlawful object of petitioners' combination and conspiracy—elimination of long-haul truck competition—was plainly calculated to injure respondents. The injury was not exclusively legislative. The attacks on respondents were primarily directed to the public at large, including respondents' shippers and customers. The immediate aim was to foment resentment and hostility. As the District Court found, the truckers, without justification "were categorized as law-breakers, road-hoggers, completely indifferent to the safety of others on the highway and moochers on the public through failure to pay their way."

Brief of Respondents at 8, *Noerr* (No. 60-50) (citation omitted).

This Court nevertheless held that the railroads' genuine attempt to influence the legislature through its public relations campaign insulated them from Sherman Act liability even for the direct harm caused to the truckers. As the Court explained, 365 U.S. at 143-144,

> It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed. And it seems equally inevitable

that those conducting the campaign would be aware of, and possibly even pleased by, the prospect of such injury. To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns.

The present case is no different. It is not disputed that Allied's campaign to exclude ENMT from the NEC was part of a genuine effort to influence legislation. Had Carlon actually offered any substantial proof of "direct" harm—it did not—the decision below would remain untenable under *Noerr*. The notion that Allied "marketed the stigma," adopted by the court of appeals (Pet. App. 9a n.3), offers no escape from this conclusion. Even if the evidence for this conception were substantial rather than trivial, as it was,[21] the injury thus described was at most an incidental accompaniment of the Allied campaign for legislative exclusion of ENMT. The rule of *Noerr* precludes assessing damages for such effects.

III.

WHOLLY APART FROM *NOERR*, ALLIED'S CAMPAIGN TO EXCLUDE ENMT FROM THE NATIONAL ELECTRICAL CODE DID NOT CONSTITUTE AN UNREASONABLE RESTRAINT OF TRADE

Since *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918), this Court and the lower courts have consistently applied the rule of reason to Sherman Act claims arising

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21 The "marketing" theory rested on some presentations to legislatures (Tr. 2734-36) as well as movies and brochures addressing the safety problem created by evidence of PVC toxicity (Tr. 2981-83; 2991-92; P.X. 656, at A. 1973; P.X. 655, at A. 1971). All of these activities are themselves protected by *Noerr*. And some presentations did not even mention the exclusion of ENMT from the NEC (*see* Tr. 2950-51, 3186-88). Indeed, the only materials for the public in which Allied mentioned the NFPA vote were a press release and two brochures containing factually correct, constitutionally protected discussion of toxicity (A. 1971-79). On dubieties like these, Carlon's experts purported to calculate damages ranging from $59.9 to $86.1 million (P.X. 557), and this was thought by the court of appeals to justify the jury's verdict of $3.8 million.

out of certification, standardization, and self-regulation programs of trade associations that do not involve boycotting, price fixing, or market division.[22] In applying the principles to the present case, we begin with the fundamental premise that certification and safety standard programs, and particularly code-making of the sort at issue here, serve important, procompetitive functions in our economy. "Industry-wide certification programs should be recognized not merely as consumer protection devices, but as increasingly valuable elements for building competition and manufacturing efficiency and productivity in the market hierarchy." Howe and Badger, *The Antitrust Challenge to Non-Profit Certification Organizations: Conflicts of Interest and a Practical Rule of Reason Approach to Certification Programs as Industry-Wide Builders of Competition and Efficiency*, 60 Wash. U.L.Q. 357, 357 (1982). Thus, even without regard to *Noerr*, the activity of legitimate trade groups or industry associations should give rise to liability only when their processes go awry in serious respects material under the Sherman Act.[23]

Viewed in this light, the activities of Allied in the NFPA and thereafter could not soundly be held to be an unlawful restraint of trade. There is no valid basis for finding antitrust liability where, as here, the safety standard promulgated by the NFPA

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22 *See Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985); *National Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679, 691 (1978); *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563 (1925). *Cf. Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); *Fashion Originators' Guild v. Federal Trade Comm'n*, 312 U.S. 457 (1941).

23 *See* Wachtel, *Product Standards and Certification Programs*, 13 Antitrust Bulletin 1, 10-11 n.25 (1968):

> Commenting on the consent decree in *United States v. Southern Pine Ass'n*, 1940-1943 Trade Cas. ¶ 56,007 (E.D. La. 1940) (which expressly excluded standard-making from its coverage) then Assistant Attorney General Thurman Arnold said: '. . . standardization programs in and of themselves are not condemned by the Department. It is the wrongful use to which such programs have been put that has been questioned' (quoted in Pearce, *Trade Association Survey*, TNEC Monograph No. 18 at p. 318 (1941)).

was not only substantively valid, but was also the product of a lawful procedure that gave Carlon full access to the decision-making process.

A. The Good Faith Exclusion of ENMT From The National Electrical Code, Supported by Objective Scientific Evidence, Was Not an Unlawful Restraint of Trade

Carlon's concession at trial that the safety standard sought by Allied was supported by objective scientific evidence should be dispositive under the rule of reason. The dissemination of information can wrongly suppress competition only if the information is false. Bringing accurate information into the marketplace *promotes* competition by enabling consumers to make more educated choices. *See* Howe & Badger, *supra*, at 378. Additionally, the dissemination of accurate safety standards encourages the participation of more competitors in the marketplace: "By manufacturing in accordance with standards the small businessman may reduce design costs and, by evidencing compliance with standards, offset some of the marketing advantages of his larger competitor." *Id.* at 12. *See* Wachtel, *Product Standards and Certification Programs*, 13 Antitrust Bulletin 1, 10-13 (1968). As this Court said in *Maple Flooring Manufacturers Association v. United States*, 268 U.S. 563, 583 (1925):

> Free competition means a free and open market among both buyers and sellers for the sale and distribution of commodities. Competition does not become less free merely because the conduct of commercial operations becomes more intelligent through the free distribution of knowledge of all the essential factors entering into the commercial transaction.

Sherman Act liability is ordinarily not imposed for the dissemination of information about a product unless the information being spread is false.[24] Holding Allied liable for spread-

24 Of course, this Court has found Sherman Act liability for the dissemination of truthful information when that dissemination accompanies and facilitates a price-fixing or boycotting conspiracy. *See, e.g., Fashion Originators' Guild of America, Inc. v. Federal Trade Comm'n*, 312 U.S. 457 (1941) (boycott); *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921) (price-fixing); *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1913) (boycott). But the present case does not involve any of these activities that *per se* violate the Sherman Act. Allied was not found to have participated in a boycott of Carlon or its product, or to have sought the exclusion of Carlon from the NFPA's standard-setting process.

ing the truth about Carlon's product through the NFPA proceedings and thereafter, even for doing so jointly, would be an unprecedented and dangerous expansion of the Sherman Act. *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982), provides an illustrative contrast. In *Hydrolevel*, this Court found the American Society of Mechanical Engineers ("ASME") liable for the intentional misinterpretation of one of its safety codes by an ASME member acting in ASME's name. The member had fabricated the misinterpretation, contained in a letter the member had written for an ASME subcommittee, to disparage Hydrolevel's product. That false, misleading, and harmful action by an ASME agent was held to violate the antitrust laws. *See also Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961).

The Court in *Hydrolevel* expressly noted that the dissemination of information supported by objective scientific evidence would present a very different case: "[W]e do not face a challenge to a good faith interpretation of an ASME code reasonably supported by health or safety considerations." 456 U.S. at 577.

As suggested by this caveat in *Hydrolevel*, a plaintiff asserting anticompetitive consequences resulting from the issuance of a safety code or standard usually attacks the technical validity of the standard. That is, the antitrust claim is based on the charge that the standard itself was not bona fide. Although this Court has not yet squarely faced the issue, lower courts considering antitrust challenges to safety standards have con-

sistently rejected such challenges when the standards have been determined to be valid. *See, e.g., Eliason Corp. v. National Sanitation Foundation*, 614 F.2d 126 (6th Cir.), *cert. denied*, 449 U.S. 826 (1980); *Structural Laminates, Inc. v. Douglas Fir Plywood Ass'n*, 261 F. Supp. 154 (D. Or. 1966), *aff'd*, 399 F.2d 155 (9th Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969); *Roofire Alarm Co. v. Royal Indemnity Co.*, 202 F. Supp. 166 (D. Tenn. 1962), *aff'd*, 313 F.2d 635 (6th Cir.), *cert. denied*, 373 U.S. 949 (1963).

Here, Allied spoke the truth and misrepresented nothing, broke no law, and pressed a genuine concern for safety while it unquestionably sought a commercial advantage over Carlon. Whether or not a jury calls such conduct "subversive," the Sherman Act does not reach it.

B. NFPA Procedural Fairness and the Absence of Antitrust Injury Negate Any Claim of Sherman Act Liability Resulting from Block Voting

Even if technical validity did not end the matter, the manner of the NEC's adoption did not cause Carlon cognizable antitrust harm. Promulgation of the NFPA's electrical conduit standard passes any pertinent test of procedural fairness. The jury's specific fact findings—that Allied did not violate the NFPA's rules, that the rules were fair, that the NFPA membership vote did not effectively determine whether Article 331 would be excluded, and that Allied did not deprive Carlon of full and effective access to the NFPA (J.A. 24)—make this clear. *Cf. Silver v. New York Stock Exchange*, 373 U.S. 341, 361 (1963).

These findings negate any claim that Allied deprived Carlon of a fair hearing at the NFPA. The Sherman Act does not prescribe rules of procedure or limit pressure tactics within a private standard-setting organization any more than it regulates shareholder conduct within a corporation, the internal behavior of members of a partnership or the membership of a club or trade association. *See Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 293

(1985). So far as the Sherman Act is concerned, it is the *external* result—the outward behavior of the entity—that is to be judged when there is a claimed restraint of trade. If that behavior is price-fixing or a boycott, it violates the Sherman Act. There is no such violation where, as here, the behavior is withholding (or causing the withholding of) organizational approval for a product for which there is objective, scientific evidence of life-endangering toxicity.

Since the Sherman Act's adoption, this Court has consistently applied the Act only to those commercial activities that either directly or by analogy could be regarded as "comparable to restraints deemed illegal at common law," namely,

> contracts for the restriction or suppression of competition in the market, agreements to fix prices, divide marketing territories, apportion customers, restrict production and like practices, which tend to raise prices or otherwise take from buyers or consumers the advantages which accrue to them from free competition in the market.

Apex Hosiery Co. v. Leader, 310 U.S. 469, 497-98 (1940). "Subversion" (without even violation) of NFPA rules does not meet that test.

The subversion finding, read most generously, could mean no more than that Allied acted unethically in its campaign to have the NFPA adopt a scientifically supportable safety standard. This finding is insufficient to ground Sherman Act liability. "It has long been recognized that there are many unfair methods of competition that do not assume the proportions of Sherman Act violations." *Federal Trade Comm'n v. Cement Inst.*, 333 U.S. 683, 694 (1948). Conduct that violates ethical standards—even unfair competitive conduct that injures competitors—does not violate the Sherman Act unless the activity itself directly restrains trade.

In a series of cases, the lower federal courts have followed this Court's lead and held that unfair competition, even when the product of group action, does not necessarily violate the Sherman Act. The decision in *Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648 (7th Cir. 1984), is illustrative. Allegations that

defendants used unethical means to purchase oil below cost, which they then resold below the market price, were held not to state a Sherman Act claim:

> From an antitrust standpoint it is as if the complaint alleged that the defendants were fences who brought [sic] oil at cut-rate prices from thieves and then resold it in competition with legitimate dealers at lower prices than those dealers could sell their oil. This would be a species of unfair competition like stealing a competitor's trade secret or using false advertising to divert a competitor's customers to oneself; but none of these things are antitrust violations; unfair competition, as such, does not violate the antitrust laws.

Id. at 655.[25]

To establish antitrust liability, more than unfair competition must be proved. There must be an unreasonable restraint of trade by direct intervention in the market, such as a boycott, price fixing, or monopolization—an element lacking here. In addition, the conduct must cause antitrust injury. That too is lacking.

To prevail, a plaintiff must show its injury was "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Carlon's injury, whether seen as the exclusion of its product from legislative codes or as the stigma supposedly attaching to ENMT because its toxicity was validly bought into question by

25 *See also Craig v. Sun Oil Co.*, 515 F.2d 221 (10th Cir. 1975) (business tort based on fraudulent misrepresentations was not a proper Sherman Act case), *cert. denied*, 429 U.S. 829 (1976); *Summey v. Ford Motor Credit Co.*, 449 F. Supp. 132 (D.S.C. 1976) (allegation that purchasers of repossessed and resold autos were misled into not claiming surplus due them failed to assert a claim under the Sherman Act), *aff'd*, 573 F.2d 1306 (4th Cir. 1978); *Arizona v. Cook Paint & Varnish Co.*, 391 F. Supp. 962 (D. Ariz. 1975) (allegation of false advertising did not state a claim under the Sherman Act), *aff'd*, 541 F.2d 226 (9th Cir. 1976), *cert. denied*, 430 U.S. 915 (1977).

the NFPA at Allied's instance, is simply not injury "of the type the antitrust laws were intended to prevent."

C. Construing the Sherman Act to Proscribe Allied's Conduct Would Violate Allied's Rights Under the First Amendment

On Carlon's own theory, its injury stems from Allied's dissemination to architects, builders, and consumers of information (1) concerning ENMT that even Carlon concedes was scientifically based and technically justified, and (2) concerning an action, the NFPA determination, that Allied had helped by procedurally proper means to bring about. Such activity—which amounts to nothing more than a form of commercial advertising—is protected by the First Amendment in almost the same way that the prime goal of "petitioning" legislatures is protected.

In *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), the Court noted that "[t]here is no longer any room to doubt that what has come to be known as 'commercial speech' is entitled to the protection of the First Amendment, albeit to protection somewhat less extensive than that afforded 'noncommercial speech.' " *Id.* at 637. The constitutional protection afforded commercial speech turns both on the nature of the speech and on the governmental interests served by its regulation:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 566 (1980).

Application of this test to Allied's speech and petitioning activities should invalidate the decision below under the First Amendment. Allied engaged in no false or misleading communications. It pressed serious and genuine problems of safety. There is no substantial interest under the Sherman Act in suppressing or punishing such conduct.

On our primary thesis, there is no need to reach the First Amendment issue. The cautionary concerns for speech in *Noerr* are sufficient here—together with a sound reading of the Sherman Act to begin with—to require reversal. It has seemed appropriate, nevertheless, to note at least the strong likelihood that there would otherwise be a direct conflict between the decision of the court of appeals and Allied's First Amendment rights.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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November 19, 1987

No. 87-157

Supreme Court, U.S.
FILED
DEC 31 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALLIED TUBE & CONDUIT CORPORATION,

Petitioner,

—v.—

INDIAN HEAD, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

Motivated at least in part by a desire to maintain their control over a concentrated market, petitioner and other manufacturers of steel conduit conspired to exclude respondent's competing product from the National Electrical Code by stacking the trade association meeting that adopted the Code with "bodies" who were "instructed" "how to vote" and ordered to remain "glued to [their] seats" until the agreed-upon exclusion was accomplished. While the Code was subsequently adopted, in whole or in part, by a number of state and local governmental bodies, the exclusion of respondent's product from the Code also had a direct marketplace impact separate and apart from the impact of such governmental action. In addition, petitioner marketed the stigma of the product's exclusion from the Code throughout the marketplace, causing further anticompetitive impact. The jury, under admittedly proper Rule-of-Reason instructions, found that the conspiracy, by "subvert[ing] the consensus standard making process" of the private trade association, and thus eliminating the procompetitive benefit that ordinarily justifies voluntary nongovernmental standard making, produced an unreasonable restraint of trade injuring respondent. The questions presented are:

1. Does the doctrine of *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), which exempts from the application of the Sherman Act "activities compris[ing] mere solicitation of governmental action with respect to the passage and enforcement of laws," immunize petitioner's conspiracy from antitrust scrutiny merely because the Code was eventually adopted, in whole or in part, by some organs of state or local government?

2. If petitioner's conspiracy was not immunized from antitrust scrutiny by the *Noerr* doctrine, was there evidence to support the jury's determination that the conspiracy in question unreasonably restrained trade in violation of Section 1 of the Sherman Act?

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STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

The parents of respondent (whose name was changed to TBG, Inc. after the filing of the complaint) are TBG North America Limited, TBG Holdings, N.V., Favorita Holding Company Limited, Tamara Corporation, and Thyssen-Bornemisza Continuity Trust. Respondent has no non-wholly-owned subsidiaries. Respondent's domestic affiliates are TBG North America Ltd., Agriquip Midwest, Inc., CCL Leasing Corp., Cap Inc., CLSI, Inc., C L Systems, Inc., Computer Library Services International Ltd., Continental Healthcare Systems, Inc., Ball-InCon Glass Packaging Corp., Greenland (Delaware) Inc., Information Handling Services, Inc., TBG Information Systems, Inc., Innotec Group Inc., International Berkefeld-Celle Filter Corp. of USA, Madera Glass Company, Moba USA Inc., Multi-Amp Corporation, Multi Amp Services Corporation, Mokveld Valves Inc., Predicasts International, Inc., Staalkat U.S.A. Inc., TBG Information Co. Inc., Vulcan Petroleum Inc., Vicon Credit Corporation, Vicon Farm Machinery, Inc., and Vicon Southeast, Inc. All of respondent's foreign affiliates are privately held companies.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALLIED TUBE & CONDUIT CORPORATION,

Petitioner,

—v.—

INDIAN HEAD, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

A. The Facts

Petitioner's brief ("Pet. Br.") incorporates the basic facts as stated in the opinion of the court of appeals. The Second Circuit's opinion, however, does not recite all of the pertinent facts material to consideration of the case. We accordingly set forth a more complete statement of facts below.

1. The Parties and Their Products

Petitioner and respondent manufacture products which compete head-on in the marketplace. Carlon, a division of respondent Indian Head, Inc.,[1] manufactures and sells various types

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1 After the complaint was filed, Indian Head's name was changed to TBG, Inc. For convenience, we refer to the respondent as Carlon.

of electrical conduit and fittings made of polyvinyl chloride.[2] Petitioner Allied Tube and Conduit Corporation ("Allied") is the largest producer of electrical metallic tubing ("EMT")—*i.e.*, steel conduit—in the United States. (Tr. 772).

Electrical conduit is a hollow tube that carries insulated wires which transmit electrical current. (Tr. 95-96). Carlon's product—electrical nonmetallic tubing ("ENMT")—has a number of significant competitive advantages over steel conduit due to its pliability, its lower installed cost and its lower susceptibility to short circuiting.[3] Allied and other EMT producers accordingly considered ENMT a "severe competitive threat." (Tr. 1063).

In 1980, when Carlon began offering ENMT as a substitute for EMT, it confronted a stable market dominated by five steel conduit producers, the largest of which was Allied, with a market share of 35% to 40%.[4] During the period in which ENMT was excluded from the market, these EMT manufacturers continued to enjoy close to 100% of all electrical conduit sales. (Tr. 773-74).

2. NFPA, Consensus Standard Making and the National Electrical Code

The National Fire Protection Association ("NFPA") is a "private, non-governmental . . . voluntary membership organization"[5] barred by law from attempting to influence legislation.[6] One of its principal activities is the promulgation, through a process called "consensus standard making," of product standards and codes related to fire protection. (Tr. 85, 184, 1005-06). As the term implies, through consensus standard making, NFPA's members—comprising varying interests including industry, insurance, medicine, fire fighters and government officials—attempt to reach a consensus, objectively arrived at on the merits, with respect to standards that are then offered to the public. (Tr. 305, 314, 1005). Although NFPA encourages new membership "so that it can represent as broad a spectrum as possible," no single interest is supposed to become so large that it "can predominate and make the standard the creature of that interest." (Tr. 184, 303-06, 352-55, 1032). While there are no prerequisites for voting at the annual meetings at which the standards are adopted (other than NFPA membership for a minimum time period, 30 days as of 1980), there is an "inherent assumption" that the members voting at the meeting "know what they are doing" based on the full disclosure of all relevant information. (Tr. 307, 947-48, 1571; JX-1 ¶ 24).

The NFPA code at issue here is the National Electrical Code ("NEC"), which promulgates standards for electrical systems, including electrical conduit. (Tr. 85-86; JX-1 ¶¶ 18-19). NFPA publishes the NEC every third year following a multistep, several-year-long process, ending with a debate and vote by the full membership at the annual meeting.[7] In 1980, a simple majority vote of those members present at the meeting was sufficient to approve or defeat a proposal. (PX-330 p. 5).

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2 JX-1 ¶ 3; Tr. 97, 104, 106. Citations to the record are as follows: "Tr." refers to pages of the trial transcript; "App." refers to the appendix to the petition for certiorari; "J.A." refers to the Joint Appendix in this Court; "PX," "DX" and "JX" refer, respectively, to plaintiff's, defendant's and joint trial exhibits. References to pages of the transcripts of deposition testimony given to the jury are set forth as "[name of witness] Tr."

3 Tr. 107-109, 118-24; Beile Tr. 20-21; JX-1 ¶¶ 7-8; PX-553.

4 Tr. 124-25, 772-73; JX ¶¶ 11-12; PX-69 p. 1; PX-70 p. 15.

5 JX-1 ¶ 15.

6 NFPA is registered as a tax-exempt corporation under Section 170(c) of the Internal Revenue Code. 26 U.S.C. § 170(c). As such, the distribution of "propaganda, or otherwise attempting, to influence legislation" may form "no substantial part of [its] activities." 26 U.S.C. §§ 170(c)(2)(D), 501(c)(3).

7 Tr. 133-37, 143; JX-1 ¶ 22-23; PX-330 pp. 5, 36-41; PX 554.

Following NFPA adoption, the NEC forms the basis for private decisions that directly affect market competition.[8] In addition, the Code is adopted, in whole, in part or with amendments or modifications, by many governmental entities, including state legislatures and administrative boards and county, city and other local governmental bodies.[9] Because of the NEC's reputation as the product of consensus standard making and the large number of governmental bodies involved, inclusion in the NEC is a practical prerequisite to any product's inclusion in governmental codes.[10]

Adoption by organs of government, however, is neither universal, automatic nor routine.[11] A number of jurisdictions have no electrical code. And in those states which do adopt the NEC in one form or another, there is significant lobbying at the legislative level. Indeed, approximately one-half of the states that adopt electrical codes do not adopt the NEC verbatim.[12] As Allied conceded in the district court, the NEC "does not itself have the force of law" and "is not itself legally operative." (JX-1 ¶¶ 26-27).

3. The Admitted Conspiracy to Exclude ENMT from the Market

While Allied's answer denied the conspiracy alleged in the complaint (J.A. 17), the evidence was so overwhelming that just before the case was submitted to the jury, Allied admitted it—*i.e.*, that it had conspired with, *inter alia*, Republic Steel Corporation, Wheatland Tube Company, other steel conduit manufacturers and Allied's independent sales agents to exclude

8 *See* pp. 10-12, *infra*.

9 Tr. 85-86, 286, 516-17; JX-1 ¶¶ 27-28; *see generally* Post Trial Affidavit of John Lison; Post Trial Supplemental Affidavit of John Lison.

10 *See, e.g.*, Post Trial Supplemental Affidavit of John Lison ¶ 1; Tr. 286; JX-1 ¶ 29.

11 *See* Post Trial Affidavit of Ira Sacks; Supplemental Response of Allied to Plaintiff's Fourth Set of Interrogatories.

12 Post Trial Affidavit of Ira Sacks ¶¶ 3-6.

Carlon's product from the 1981 NEC by stacking the May 1980 NFPA meeting with new Association members whose only function was to vote against the new product. (Tr. 1984; *see* J.A. 8-11). Allied also conceded that it "had a pecuniary or commercial interest in seeing to it that the product was not approved." (Tr. 2187-88). The evidence that compelled these concessions was as follows:

a. The Conspiracy's Formation

On September 18, 1978, Carlon submitted to NFPA a proposal (denominated "Article 331") to include ENMT in the NEC. (JX-1 ¶ 48; Tr. 152-59; PX-214). Following approval on the safety merits by the appropriate technical committees,[13] Article 331 was submitted to the NFPA membership for consideration at the annual meeting to be held in May 1980 in Boston. (PX-552 pp. 81-82).

When Allied and the other EMT producers became aware of Article 331, they immediately recognized, as one conspirator later wrote, that it was the "first major battleground for the attack on steel markets by segments of the plastic industry during the 80's." (PX-50 p. 1). Fully cognizant of the "severe competitive threat" posed by the new product (Tr. 1063), the conspirators agreed to exclude it from the market by rigging the vote on Article 331 at the May 1980 meeting.[14] After committee approval of Article 331 had been obtained, an "urgen[t]" meeting of the Steel Rigid Conduit and Electrical Section of the National Electrical Manufacturers Association

13 The approval of Article 331 on the merits followed a thorough investigation, including a factfinding report by Underwriters Laboratories, field demonstrations for the committee membership and review of committee comments. (Tr. 167-69, 556-57, 581-626, 731; JX-1 ¶¶ 48-59; PX-214, PX-419, PX-420, PX-453, PX-456).

14 Tr. 751, 1062-63, 1637, 1671; Chehi Tr. 17-19; JX-1 ¶¶ 64, 65, 69-75. After a study "in detail" of the adverse effect that Article 331's adoption would have on Allied's sales, Allied's Board of Directors was told that the company would lose 40% of its EMT volume by 1984—a loss which in that year alone would amount to $20 million. (Tr. 755-62, 765-67; PX-69 p. 4).

was held to discuss the matter.[15] At that meeting (and another held shortly thereafter), representatives of Allied and its coconspirators agreed that each Steel Section member company would "be asked to provide for the attendance of as many NFPA voting members as possible" at the upcoming meeting, noting that under NFPA's then-current rules persons only had to be members for thirty days to be eligible to vote.[16] It was also agreed that because "[p]roblems regarding restraint of trade are a very real concern," there would not be "direct[ ]" discussion of these problems; instead, future discussions regarding ENMT were to be limited to the "safety aspects" of the issue. (J.A. 84; Tr. 687-88, 888-89).[17] For its part, Allied pledged to bring at least 100 people to vote against Article 331. (J.A. 86-87; Tr. 689; JX-1 ¶ 74).

The conspirators left nothing to chance. A formal "battle plan" was prepared, calling for, among other things, each participant to "go[ ] all out to have bodies on the floor to vote" at the May meeting and "to contact all steel companies . . . urging them to add new members and to be in Boston to vote." (J.A. 86, 87, 80; PX-167, PX-289, PX-168; Tr. 689-92; JX-1 ¶¶ 72-75). As the "battle plan" put it, "[t]he question to ask is: What is it worth to save our conduit business . . . ?" (J.A. 88).

Allied immediately took steps to get its "troops" in line. (Tr. 792, 1069-70). Commencing in February 1980, Allied's national sales manager began contacting the company's independent sales agents—separate companies unaffiliated with

15 PX-55 p. 1; J.A. 83; Tr. 684-85; JX-1 ¶¶ 33-38, 61-63.

16 JX-1 ¶¶ 64-65, 69-72; PX-127; Tr. 888, 1064-66.

17 Petitioner's statement that Carlon conceded that "the safety standard sought by Allied was supported by objective scientific evidence" (Pet. Br. 44) is misleading. It was stipulated in the district court that there are substantial bodies of opinion, including views held by those in both the plastic and steel industries, disagreeing on the relative safety of plastic and steel conduit. As the trial court instructed the jury, "[a]ll the jury should assume is that the parties do not dispute that people disagree on the issue and there is an objective basis for a concern for safety." (Tr. 2179).

Allied—as an additional source of new NFPA voters. (Tr. 779-82, PX-588, Rosen Tr. 4-6, JX-1 ¶ 65). Allied discussed with them the adverse economic effect that approval of Article 331 would have and assigned them targeted numbers of new members to recruit. (Tr. 775-82).

All told, the conspirators delivered at least 230 members to vote against Article 331 at the meeting. Among the 155 voters that Allied alone brought to the annual meeting were its employees, sales agents and their employees, company executives, employees of two of Allied's divisions—neither of which sold electrical products and one of whose businesses was "lawn furniture and things like that"—and the wife of the national sales director. (JX-1 ¶ 95; Tr. 795-97). For the express purpose of "gathering [their] votes," Allied paid all of these individuals' expenses, totaling over $100,000 for membership fees, travel expenses and other costs. (J.A. 91; Tr. 702-03, 783-84, 1070-72; JX-1 ¶ 96; PX-572; PX-412).

b. The May 1980 Meeting—The Conspiracy Succeeds

Implementation of the conspiracy to exclude Carlon's product from the market went forward with a cocktail party in Boston on the night of May 18th. "All Allied salesmen, representatives and personnel" were informed that attendance was "imperative." (PX-28; Tr. 788-90). Allied's self-described "troops" were given "[c]omplete instructions" on what to do at the meeting, including where to sit, based on a detailed seating chart broken down by "groups"; "group leaders" responsible for "keep[ing] order among the troops" were appointed; the "troops" were told that "[o]nce the NEC ratification starts" they were "expected to stay nailed to [their] seats"; and box lunches were to be provided "in case the session carries over into the evening—*NO ONE* leaves . . . until after this evening session." (PX-30 pp. 2, 8; Tr. 791-99; JX-1 ¶¶ 98, 100). The "troops" were explicitly informed that "[y]our Group Leader *will instruct you* how the discussion is progressing and *how to vote*." (PX-30 p. 8 (emphasis added); Tr. 798-800). Representatives of a number of steel conduit manufacturers met "to reach

a consensus . . . as to the procedures that were going to be followed at the meeting"; and Allied distributed walkie-talkies to the other steel companies to assure that the "troops" voted as instructed.[18]

Faithful to their instructions, the Allied members—sitting in their predesignated "groups"—"stay[ed] nailed to their seats" during the annual meeting. (Tr. 1078; JX-1 ¶ 98). Paying "no attention" to the substance of the proceedings, the "troops" had no idea as to the merits of what was at issue. (Tr. 908-11, 1013; PX-255). Thus, even though ENMT's claimed safety risk was the purported reason for Allied's opposition, very few of its voters had any of the technical documentation necessary to follow the proceedings; *nor did a single one of them speak in opposition to Article 331 during the course of the meeting*. (Tr. 908-09, 1372-73; *compare* Tr. 1656 *with* Tr. 195-207, PX-215 pp. 43-62). As one stated when asked why, as he put it, he was "instructed to vote to return [Article 331] to committee," "I was just told to come to the meeting and be present when they voted . . . ." (Tr. 913-14).

Although Allied's voters paid no attention to the substance of the proceedings, they were careful to follow the conspirators' instructions communicated to them via their "group leaders" by walkie-talkies and "signals"—"thumbs up, yes, thumbs down, no." (Tr. 800-03, 1368-71; JX-1 ¶¶ 101-10). Two votes were taken on Allied's coconspirator's motion to return Article 331 to committee. (Tr. 195, 804-05). The first, a voice vote, was inconclusive. (Tr. 207, PX-215 p. 56). The second, a standing vote, was taken amidst "a lot of confusion and congestion." (Tr. 208-12, 804-06). When the dust settled, the Chair ruled that Article 331 had been defeated by only four votes—394 to 390. (Tr. 216; JX-1 ¶ 112). Despite requests by Carlon and others, no recount was permitted under NFPA's rules, since no one who voted against Article 331 was willing to request one. (Tr. 216-23; PX-215 pp. 57-62). Finally, "[t]o insure that there would not be [any] change" in the outcome,

18 Tr. 880-86, 1076-78; *see also* Tr. 1072-75, Rosen Tr. 53-54, PX-90 p. 1, PX-412, JX-1 ¶¶ 104-07.

Allied's "troops" were kept in their seats until 2 A.M. when the final vote on the complete Code was taken. (Tr. 1085-87, 1379-80). Absent the hundreds of "troops" enlisted by Allied and its coconspirators to do their bidding (Tr. 1088), Article 331 would have been overwhelmingly approved.

The patent subversion of NFPA's consensus standard making process was the subject of criticism during the meeting itself. (PX-215 pp. 53-57). Thereafter, there was a "negative reaction" to the conspirators' conduct, including editorials in trade magazines castigating the "mob rule" that had "abuse[d]" NFPA and turned its "code-making process . . . into a battleground for establishing commercial preference for competing product types." (Tr. 1517, PX-584, PX-585 p. 5). Allied, however, was unrepentant. The only "lesson" that its Director of Public Safety Issues drew from this hostile reaction was that the next time Allied sought to rig a vote, it should "not [be] so obvious." (Tr. 1510-11, PX-32).

Following the defeat of Article 331, Carlon (and the National Association of Home Builders) appealed on the ground that the vote was not based on the "merits," was "not representative of the membership of the association and cannot be construed as [a] consensus." (PX-568; Tr. 225-26, 231). The NFPA Board of Directors, eschewing any investigation of the substance of these allegations and viewing the scope of its review as limited to the question of whether the Association's rules had been followed, found that, while the rules had been "circumvent[ed]," they had not been violated, and denied the appeal, returning Article 331 to committee "for further study."[19]

4. The Sanders Committee Report

In the wake of the May 1980 meeting, the NFPA Board of Directors was "concerned . . . very much" about the "circumvent[ion]" of the Association's rules. (Tr. 994, 1006-07, 1033-37). As Jack Sanders, its Chairman, testified, the conspirators'

19 Tr. 228-36, 995-99, 1013-15, 1017-20, 1022-23; PX-319, JX-1 ¶ 114.

"battle plan" was inconsistent with the spirit and intent of NFPA's consensus standard making procedures. (Tr. 1008, JX-1 p. 4). For it was wholly contrary to the Association's goals "for a company that would like to keep a competitive product off the market to register as many of its employees as possible . . . so that they may vote against that competitive product." (Tr. 1032-33; *see* Tr. 270-74, JX-1 ¶ 140).

In order to "combat any potential" for repeating "that kind of activity," the NFPA Board appointed a committee headed by Mr. Sanders to review the "stacking" of the 1980 meeting and to take steps "to maintain the integrity of the [Association's] standards." (Tr. 994, 1033; JX-1 ¶¶ 141-44). After a "review in-depth [of] the entire procedural activities under which we develop our codes and standards," the committee recommended, and the Board adopted, new regulations. (Tr. 1004-05, 1010-11; FX-333, JX-1 ¶¶ 141-45). These included increasing to 180 days the minimum time that a person must be an NFPA member in order to vote at the annual meeting. (Tr. 1036-37). As Mr. Sanders testified, the specific purpose of this change was "to avoid block voting by special interest groups in the future." (Tr. 1010, 1036).[20]

5. The Conspiracy's Market Effect

The successful conspiracy to exclude Article 331 from the 1981 NEC had the direct effect of excluding Carlon's product from the marketplace. In addition to the exclusionary impact in those jurisdictions which adopted the NEC as their electrical code and thereby precluded the lawful use of Carlon's product altogether, competition was inhibited by the stigma—and Allied's marketing of that stigma—resulting directly from the

20 With the new rules in place, and without opposition by Allied, Article 331 was finally included in the 1984 NEC, but with the limitation that ENMT could be used only in structures up to three stories in height. (Tr. 268, 270, 1658; PX-595 pp. 201-03). At its May 1986 meeting, NFPA approved a new Article 331 deleting the three-story limitation from the 1987 NEC. Allied's appeals from that approval were denied, and the Code now includes Article 331 without material limitation on ENMT's use.

wrongful exclusion of ENMT from the NEC even in those jurisdictions where Carlon's innovative and less expensive product could be lawfully used, *i.e.*, jurisdictions which (1) had no electrical code; (2) had adopted the 1981 NEC, but modified it to permit ENMT's use; or (3) later adopted the 1984 NEC, which permitted the use of ENMT.

This stigmatization of ENMT was successful because of the reliance by private decision-makers on the NEC's reputation as a product of consensus standard making. Thus, it was stipulated that "[t]hird party certifiers of electrical equipment such as Underwriters Laboratories will normally not list and label a product without NEC approval."[21] Similarly, many electrical inspectors, contractors and distributors will not use a product absent NEC approval and the UL label, and underwriters will refuse to insure structures that are not built in conformity with the NEC. (Tr. 145-46, 288-90, 296-97; JX-1 ¶ 32).[22] And Allied fully capitalized on Carlon's predicament, doing "everything it could to make sure that as many people as possible found out about the defeat of Article 331," including advertisements and distribution of documents to "people in the industry" informing them of the defeat. (Tr. 2979-89).

In short, ENMT's exclusion from the 1981 NEC—the "primary code for the electrical industry in the United States"—effectively excluded the product from the marketplace. (JX-1 ¶¶ 25, 29; *see* Tr. 292, 300, 2589-90). This adverse market impact flowed directly from the conspiracy which subverted the consensus standard making process and from the public's reliance on the NEC as the purported product of unbiased industry consensus. (*See* Tr. 314, 532-33). The 1981 NEC gives no hint that it was the product of subversion or that it was adopted on any grounds other than the merits (PX-581); and,

21 JX-1 ¶ 31; *see* JX-1 ¶ 30; Tr. 290-91, 300, 556-57; PX-138 p. 2; DX-WS p. 3.

22 Petitioner's suggestion (Pet. Br. 40) that the conspiracy's direct market effect was an afterthought introduced only in the damages phase of the trial is incorrect. The stipulation cited in the text was introduced into evidence as a joint exhibit during the liability phase.

needless to say, neither Allied nor its coconspirators informed the public that the Code resulted from a stacked meeting at which the process had been subverted. To the contrary, as noted above, Allied fully exploited the stigma that its own conduct brought about throughout the marketplace.

B. The Proceedings Below

1. The Trial

After extensive pretrial proceedings, a bifurcated jury trial commenced on March 4, 1985 on Carlon's claim that Allied and its coconspirators had combined and conspired to "subvert NFPA's . . . consensual standards, rules and procedures" in order "to prevent competition from non-metallic tubing by excluding it from the 1981 NEC." (J.A. 10, 8). After four days of deliberation on the liability issues, the jury, in response to special questions, rendered its verdict, finding, *inter alia*, that "Allied's conduct in opposing Article 331 adversely impact[ed] competition," "constitute[d] an unreasonable restraint of trade in violation of the antitrust laws," and was "a substantial or material factor in excluding Article 331 from the 1981 NEC."[23] Among its other findings, the jury concluded that "[r]egardless of whether Allied's conduct violated any of the rules or regulations of the NFPA"—which the jury found it did not (J.A. 24)—"Allied's conduct subvert[ed] the consensus standard making process of the NFPA"[24] and did not "constitute the least restrictive means of effectively expressing Allied's opposition to the use of ENMT in the marketplace."[25]

At the conclusion of the damages phase of the trial, the court instructed the jury that any award of damages must be limited to those incurred by Carlon as a result of the actions of Allied and its coconspirators "at the May 1980 meeting and [their] marketing of that defeat [of Article 331] in the marketplace."[26] The court went on to instruct the jury that Carlon did not claim, and the jury could not award, damages premised on any lobbying activities on Allied's part. (Tr. 3266). Based upon these instructions, the jury found that "as a proximate result of

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23 J.A. 24-25. Under the district court's Rule-of-Reason charge, the jury was instructed to consider whether the NFPA's rules were "reasonably designed to secure a consensus with respect to safety of products as they were accepted or not accepted in the electrical code" and whether "the procedures that were followed at the floor meeting in May of 1980 [were] consistent with the spirit . . . of the rules of the NFPA." (Tr. 2250-51). In finding that Allied's conduct unreasonably restrained trade (J.A. 25) under that charge (the correctness of which is not challenged in this Court), the jury implicitly answered these questions in the negative—findings buttressed by the specific determination that Allied's conduct "subvert[ed] the consensus standard making process of the NFPA." (J.A. 24).

24 *Id.* While petitioner now asserts that the jury did not understand the subversion question and that the question was too vague for the jury to answer (Pet. Br. 27), Allied did not challenge at trial or in its post-trial motion in the district court the wording of any of the questions or of the court's charge relating to subversion. Indeed, the parties agreed upon the wording of the questions put to the jury.

25 J.A. 25. The jury also found that the "vote of the membership at the [May 1980] annual meeting [did not] effectively determine whether Article 331 would be excluded from the NEC," that "the NFPA rules and regulations [were] fair in that they provided a full and effective appeal from the vote of the membership," that "Allied's conduct [did not] deprive Carlon of full and effective access to the NFPA," that "Allied ha[d] a genuine belief as of May 1980 that . . . [ENMT] was unsafe," and that "[i]n opposing Article 331 in May, 1980, . . . Allied act[ed], at least in part," on that belief. (J.A. 23-25).

26 Tr. 3266. The district court charged the jury that:

> [T]he plaintiff's argument is what happened in May 1980 has created a certain stigma on the product which has carried through and that the defendants have attempted to market that stigma in the years which have ensued so that the extent of the damages which it now suffered are as a direct result[] of what happened in 1980, and that is the plaintiff's claim. *The plaintiff claims [its] damages do result from what happened in May 1980 and not from any conduct of the defendants that they were engaged in other than the marketing of that defeat in 1980 in the years that follow. That's the plaintiff's claim.* (J.A. 30) (emphasis added).

Allied's unreasonable restraint of trade in violation of the antitrust laws," Carlon lost $3.8 million in profits. (Tr. 3288, J.A. 25).

In light of, *inter alia*, the district court's charge, Carlon's and Allied's counsels' opening and closing arguments at the damages trial, and Allied's stipulation of facts as incorporated in the final pre-trial order,[27] it is remarkable that Allied claims that "[t]he injury to Carlon, if any, was caused by the adoption of the NEC by various state legislatures . . ."; and that "[i]f Allied's lobbying efforts had been unsuccessful in obtaining state legislation, there would have been no harm to Carlon." (Pet. Br. 40-41). If, as Allied argues, Carlon was injured exclusively by legislative enactment of the NEC, *i.e.*, only in those jurisdictions that adopted the NEC, there would have been no need for Allied to have "marketed" the defeat of Article 331; for exclusion from the NEC would *ipso facto* have resulted in exclusion of Carlon's product from the market *in those jurisdictions*. Allied's "marketing" efforts were the coup de grace in the *other* jurisdictions which did not enact the Code.

2. The District Court's Oral Decision

In an oral bench decision, the district court held that the *Noerr* doctrine "require[d]" that the jury's verdict be set aside. (App. 25a). The underlying rationale of the court's ruling is not entirely clear. On the one hand, the court suggested that NFPA functions as a quasi-legislature and that, as a result, Allied's conduct in causing the Association to keep Article 331 out of the NEC constituted petitioning for legislation. (*See, e.g.*, App. 25a-26a).[28] On the other hand, the court also expressed the view that once the NEC is adopted by NFPA it "will almost inescapably be followed by the legislatures of the

27 J.A. 30-31; Tr. 3220-21, 3247-50, 2311-20, 3195; *see* pp. 10-12, *supra*.

28 *See also* Hearing Transcript, June 27, 1986, at p. 69.

various states" and, as a result, the entire NFPA standard setting process—including the complained-of concerted conduct—was no more than an attempt by Allied and its coconspirators to persuade state legislatures to adopt their anti-ENMT position. (App. 25a-26a).

3. The Court of Appeals' Decision

On April 22, 1987, the Court of Appeals for the Second Circuit (in an opinion by Senior Circuit Judge Lumbard, joined by Circuit Judges Kearse and Pratt) unanimously reversed, rejecting both of Allied's arguments for antitrust exemption.

At the outset, "declin[ing] Allied's invitation to extend *Noerr-Pennington* immunity to lobbying activities directed toward a 'quasi-legislative' body such as the NFPA," the court recognized that none of the concerns upon which *Noerr*'s holding was based applied to private organizations. (App. 12a). Unlike a government, a private organization is unelected, unaccountable and " 'presumed to be acting primarily on . . . its own behalf.' " (App. 13a-14a, quoting *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 45 (1985)). Thus, "[n]o . . . safeguards [similar to those applicable to governments] exist to prevent a private organization from adopting policies contrary to the interests of the general public—in the instant case, establishing an anticompetitive restraint of trade." (App. 14a). Echoing this Court's decision in *American Society of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 456 U.S. 556, 570 (1982), the court of appeals emphasized that the concern that private standard setting organizations "might operate contrary to the public interest becomes particularly acute in view of their importance within the economy." (App. 15a). The court agreed with the Fifth Circuit's analysis in *Feminist Women's Health Center, Inc.* v. *Mohammad*, 586 F.2d 530 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979), and concluded that the fact that state and local governments may—but are not required to—adopt the NEC "does not transform the NFPA into a governmental organ." (App. 16a).

Turning to Allied's second argument—that its subversion of the standard making process was protected as an "indirect petition"—the court held that "Allied's behavior, which itself caused independent antitrust injury to Carlon, should not be excused merely because its actions also indirectly influenced state and local governments." (App. 17a).[29] Again agreeing with the view of the Fifth Circuit,[30] the court differentiated between the "submission of a group's recommendations to the government"—which *is* protected—and "the antecedent conduct which generated those recommendations"—which is *not* protected. (App. 17a). Nor was the court "swayed by Allied's contention that . . . the only effective method of influencing . . . governments is through the NEC amendment process." (App. 18a). As Allied conceded, it had the opportunity to lobby the governments and, indeed, "over half the states and cities [that Allied] polled either amended the NEC before adopting it or refused to adopt it at all." (App. 18a-19a). The court of appeals likewise rejected Allied's argument that denial of antitrust immunity "would be inconsistent" with this Court's ruling in *Noerr* since, unlike the railroads' publicity campaign in that case, Allied's subversion did not "constitute[ ] 'political activity' conducted within the 'political arena.' " (App. 19a). "Simply put, Allied's conduct did not constitute petitioning of the government within the meaning of *Noerr-Pennington*; rather, its conduct was a subversion of the legitimate purposes of the NFPA." (App. 17a).

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29 The court expressly noted that the district court had instructed the jury to allow damages only on the basis of direct injury flowing from Allied's conduct and not for "any injury arising from the adoption of the NEC by the various governments" (App. 9a n.3); and that Allied had challenged neither the correctness of, nor the foundation for, the jury's computation of the damage directly resulting from the stigma of exclusion from the NEC. (*Id.*) Significantly, Allied did not move for a directed verdict at the close of the damages phase of the trial, implicitly conceding the sufficiency of the evidence on the issue.

30 *See* Feminist Women's Health Center, Inc. v. Mohammad, *supra*, 586 F.2d at 545; United States v. Southern Motor Carriers Rate Conference, Inc., 702 F.2d 532, 542 (5th Cir. 1983), *reaff'g en banc* 672 F.2d 469 (5th Cir. 1982), *rev'd on other grounds*, 471 U.S. 48 (1985).

The court of appeals also rejected Allied's further contention that, even if not immunized by *Noerr*, its conduct did not constitute an unreasonable restraint of trade. (App. 19a-22a). The court "refuse[d] to permit [Allied] to use its literal compliance with [NFPA's] rules as a shield to protect [its conspiracy] from antitrust liability." (App. 21a). Nor did it find any merit in Allied's reliance on the existence of objective scientific evidence to support the exclusion of Carlon's product from the NEC since the " 'objective validity' of a restraint has never been a defense to an antitrust charge." (App. 22a).

Following the panel's decision, Allied petitioned the Second Circuit for rehearing and rehearing *en banc*, arguing specifically that the court of appeals had misconceived the trial record in concluding that Carlon's damage award was based on injury stemming from the direct marketplace effect of Allied's conduct. (*See* Petition for Rehearing at 7-13). On June 11, 1987, that petition was denied, no judge who heard the appeal and no active judge of the court "ha[ving] requested that a vote be taken thereon."

SUMMARY OF ARGUMENT

The court of appeals held that Allied's admitted conspiracy to exclude Carlon's product from the market by denying it inclusion in the National Electrical Code—a conspiracy found by the jury to constitute an unreasonable restraint of trade under the Rule of Reason—was not immunized from antitrust scrutiny by the doctrine of *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). That holding confined the *Noerr* doctrine to that category of cases involving "mere attempts to influence the passage or enforcement of laws" (365 U.S. at 135) and properly declined to extend it to the concerted conduct involved in this case: an agreement to subvert the standard making process by rigging the vote at a trade association meeting for the purpose of excluding a competitive product from a widely accepted industry code. Even though the code produced by those processes

was eventually adopted by some organs of state and local government, that circumstance did not bring Allied's conduct within the category of governmental petitioning with which the *Noerr* doctrine is concerned.

I. The Second Circuit's decision correctly distinguished between traditional restraints of trade governed by the Sherman Act and petitions by private parties seeking governmental action which itself may restrain trade. Antitrust principles have long been applied to regulate the opportunities for anticompetitive abuse inherent in standard making trade associations whose membership, like that of NFPA, includes commercial interests. Allied's conspiracy to exclude a competitive product from the market by polluting a widely-accepted industry code thus falls well within the antitrust mainstream.

By the same token, Allied's conspiracy was not a political effort designed to persuade state governments to act in a manner favorable to Allied and its steel conduit manufacturing cohorts. NFPA is not an organ of government, nor has it been delegated any governmental authority. What is more, Allied's conduct in conspiratorially stacking the vote at a standard setting meeting is the antithesis of the type of political lobbying which implicates the *Noerr* doctrine. Rather than rely on open debate in an effort to persuade, Allied and its coconspirators subverted the process by rigging the vote to produce a preordained result. The conspiracy, by stigmatizing Carlon's product, had a direct anticompetitive impact on the marketplace separate and apart from any effect flowing from ultimate adoption of the Code by organs of state and local government. That direct effect renders the state action doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943), inapposite and underscores the concomitant inapplicability of *Noerr*.

Petitioner's invocation of First Amendment rights of free speech, association and petition is inappropriate when viewed in the context of its admitted conduct—pollution of an industry code by voters whose presence was paid for and who did as they were told with no participation in any debate. And

Allied's suggestion that application of the Sherman Act to its conspiracy will somehow injure the code-making process is equally without foundation. Rather, it is the application of *Noerr* to shelter Allied's conduct from antitrust scrutiny that would cast a pall over all consensus standard making. When open discussion is eschewed in favor of vote rigging, no one—neither private citizens nor governmental organs—can safely rely on privately promulgated standards, and the public safety invariably suffers as a result.

Finally, even if Allied's conduct were somehow viewed as part of the petitioning process, it plainly was a sham. The conspiracy to subvert the National Electrical Code effectively diluted Carlon's vote within the Association and abused the process which Allied claims led to acts of government. As such, as the Ninth Circuit concluded in *Sessions Tank Liners, Inc.* v. *Joor Mfg., Inc.*, 827 F.2d 458 (1987), Allied forfeited any *Noerr* protection.

II. Once the claim of *Noerr* immunity is rejected, the jury's finding that Allied's admitted conspiracy to exclude competition unreasonably restrained trade is unassailable. Allied did not challenge the trial court's Rule-of-Reason instructions, and the evidence was more than sufficient to support the jury's verdict.

ARGUMENT

I.

THE *NOERR* DOCTRINE DOES NOT IMMUNIZE ALLIED'S ANTICOMPETITIVE CONSPIRACY FROM ANTITRUST SCRUTINY

In *American Society of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 456 U.S. 556, 570-71 (1982), the Court emphasized that private standard setting organizations "wield[ ] great power in the Nation's economy" and are "rife with opportunities for anticompetitive activity," which can have a widespread impact given the pervasive influence that voluntary codes have on governments and private parties alike. This case presents a paradigmatic instance of how such opportunities can be seized to destroy the marketplace's competitive fabric and injure those seeking the chance, guaranteed by the Sherman Act, to compete on the merits of price, quality and service free from unreasonable restraint.

Petitioner's effort to cloak its conspiracy in the *Noerr* doctrine boils down to the assertion that Congress, although it enacted the Sherman Act as "the Magna Carta of . . . our free-enterprise system,"[31] intended to remove from all antitrust scrutiny the concerted and calculated subversion of private standard-making procedures for the purpose of excluding a competitor's product from the market—solely because some organs of state and local government ultimately decide to adopt the Code resulting from that subversion. Nothing this Court said, much less held, in *Noerr* even remotely supports that remarkable proposition.

For the *Noerr* doctrine applies only to those "activities compris[ing] mere solicitation of governmental action with respect to the passage and enforcement of laws." 365 U.S. at 138. And Allied's admitted conspiracy to exclude Carlon's product from the market involved neither lobbying nor politi-

31 United States v. Topco Assocs., 405 U.S. 596, 610 (1972).

cal activity. The Second Circuit was thus eminently correct in concluding that "Allied's conduct did not constitute petitioning of the government within the meaning of *Noerr* . . . ." (App. 17a).

A. Allied's Vote-Stacking Conspiracy Was Not Mere Solicitation of Governmental Action

The linchpin of petitioner's argument is its proclamation—repeated time and again throughout its brief—that the conduct for which it has been found liable was nothing more than "lobbying directed at quasi-legislative code-making bodies" "where the ultimate goal is to influence state legislatures that will rely upon the final code." (Pet. Br. 17, 21). To characterize Allied's conspiracy in such a manner not only distorts the record,[32] but utterly mischaracterizes the essential teaching of *Noerr* and its progeny. What this record amply reveals is a blatant conspiracy in unreasonable restraint of trade which was designed to, and actually did, produce a polluted industry code that improperly excluded a competitive product from the marketplace. The fact that the code was, in one form or another, eventually adopted by some organs of government in no way transforms that restraint of trade into the type of political petitioning with which the *Noerr* doctrine is concerned.

1. The *Noerr* Doctrine

In *Noerr*, this Court upheld the defendant railroads' effort, through a concerted publicity campaign, to influence state government decision-making with respect to proposed legislation. The Court concluded that those petitioning efforts did not run afoul of the antitrust laws because Congress did not intend the Sherman Act to prohibit "mere solicitation of

32 As we demonstrate, *infra*, NFPA is not a "quasi-legislative body," since it has never been delegated to perform governmental functions by any organ of government and, in fact, eschews such a governmental role; and the conspiracy was designed to have, and actually had, a significant direct impact on the marketplace regardless of the actions of any state legislature.

governmental action with respect to the passage and enforcement of laws." 365 U.S. at 138.[33] As Justice Black explained, the Sherman Act "does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." *Id.* at 136.

The Court's conclusion that Congress did not intend the Sherman Act to reach such conduct derived from two complementary propositions: (a) There is an "essential dissimilarity" between "an agreement jointly to seek legislation or law enforcement and agreements traditionally condemned by § 1 of the Act" (*id.*); and (b) applying the Sherman Act to concerted petitioning of the government "would raise important constitutional questions" since "[t]he right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms" (*id.* at 138).

In light of these principles, it did not matter that the railroads' "sole purpose in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitors . . . ." *Id.* Given the "right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws" (*id.* at 139), the Court refused to condemn the railroads' conduct: "[A]t least insofar as [it] was directed toward obtaining government action, its

33 Petitioner takes issue with the court of appeals' characterization of *Noerr*'s rule as one of antitrust "exemption" to be construed narrowly. (Pet. Br. 17). But such semantic quibbling takes Allied nowhere. As the Court explained in City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 399 (1978), the doctrine is one of "implied exclusion[] from coverage of the antitrust laws" and is subject to a "presumption against repeal by implication." Indeed, as Justice Brennan went on to note, the doctrine has been "unavailing to prevent antitrust enforcement which, though implicating [the] fundamental policies [underlying the doctrine] was not thought severely to impinge upon them." *Id.* at 400. Here, as we explain *infra*, the policies underlying the *Noerr* doctrine are not implicated because Allied's conspiracy in unreasonable restraint of trade did not constitute petitioning for governmental action.

legality was not at all affected by any anticompetitive purpose it may have had." *Id.* at 139-40.

The *Noerr* doctrine[34] accordingly shelters anticompetitive private conduct only when that conduct does not itself partake of a traditional restraint of trade but, instead, seeks to induce the government to take action which restrains. Here, Allied's conspiracy was a traditional restraint of trade, not mere solicitation of a restraint to be imposed by organs of government.

2. The Conspiracy Was a Traditional Restraint of Trade

The contrast between Allied's conspiracy to exclude Carlon's product from the market and the publicity campaign immunized from antitrust in *Noerr* could not be more striking. The conspiracy in this case falls squarely within antitrust's mainstream. It was, in *Noerr*'s words, "characterized by an express . . . agreement . . . that the participants will jointly . . . help one another to take away the trade freedom of others . . . ." 365 U.S. at 136.

Antitrust, from its very beginnings, has had a strong antipathy toward private combinations that act "in reality [as] an extragovernmental agency, which prescribes rules for the regulation and restraint of interstate commerce." *Fashion Originators' Guild of America, Inc.* v. *FTC*, 312 U.S. 457, 465 (1941). "The Sherman Act was specifically intended to prohibit independent businesses from becoming 'associates' in a common plan which is bound to reduce their competitor's opportunity to buy or sell the things in which the groups compete." *Associated Press* v. *United States*, 326 U.S. 1, 15 (1945).

In accordance with these settled principles, the antitrust laws have long been applied to horizontal combinations which have the purpose or effect of excluding competing goods or services

34 In United Mine Workers v. Pennington, 381 U.S. 657, 670 (1965), and California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972), the doctrine was held to apply to petitioning of the executive, administrative and judicial branches of government as well as the legislature.

from the marketplace. Trade associations engaged in standard making, which has an obvious potential for anticompetitive abuse, are a prime example of such combinations. In *American Society of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 456 U.S. 566 (1982), for example, the Court affirmed a Sherman Act judgment against a standard setting association based on its agents' manipulative interpretation of an existing industry code. *A fortiori*, concerted conduct which subverts the standard making process so as to produce an exclusionary industry code in the first place runs afoul of antitrust. To paraphrase *Hydrolevel*, "[Allied] successfully used its position within [NFPA] in an effort to thwart [Carlon's] competitive challenge." 456 U.S. at 562.

Over decades of Sherman Act litigation, the courts have routinely subjected agreements concerning the setting and implementation of standards to traditional antitrust analysis with no hint of *Noerr* immunity. Indeed, petitioner itself recognizes as much when it correctly states (Pet. Br. 42-43) that "[s]ince *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918), this Court and the lower courts have consistently applied the rule of reason to Sherman Act claims arising out of certification, standardization and self-regulation programs of trade associations that do not involve boycotting, price fixing, or market division."[35]

35 *See* ECOS Elec. Corp. v. Underwriters Laboratories, 743 F.2d 498, 502-03 (7th Cir. 1984), *cert. denied*, 469 U.S. 1210 (1985); Gunter Harz Sports, Inc. v. United States Tennis Ass'n, 665 F.2d 222, 223 (8th Cir. 1981); Consolidated Farmers Mut. Ins. Co. v. Anchor Sav. Ass'n, 1980-2 Trade Cas. (CCH) ¶ 63,530, at 76,843 (10th Cir. 1980), *aff'g* 480 F. Supp. 640, 648-56 (D. Kan. 1979); E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm., 467 F.2d 178, 185-88 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973); Structural Laminates, Inc. v. Douglas Fir Plywood Ass'n, 261 F. Supp. 154, 158 (D. Or. 1966), *aff'd*, 399 F.2d 155 (9th Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969); Roofire Alarm Co. v. Royal Indemnity Co., 202 F. Supp. 166, 169-70 (E.D. Tenn. 1962), *aff'd without opinion*, 313 F.2d 635 (6th Cir.), *cert. denied*, 373 U.S. 949 (1963).

Where standard setting has involved price fixing agreements or horizontal boycotts, the *per se* rule has been applied. *See* Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961); Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 41-42, 49 (1912); United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 180-81, 198-200 (3d Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); National Macaroni Mfrs. Ass'n v. FTC, 345 F.2d 421, 426 (7th Cir. 1965); C-O-Two Fire Equip. Co. v. United States, 197 F.2d 489, 493-97 (9th Cir.), *cert. denied*, 344 U.S. 892 (1952); Bond Crown & Cork Co. v. FTC, 176 F.2d 974, 979-81 (4th Cir. 1949); Fort Howard Paper Co. v. FTC, 156 F.2d 899, 901-03, 905 (7th Cir.), *cert. denied*, 329 U.S. 795 (1946); Milk & Ice Cream Can Inst. v. FTC, 152 F.2d 478, 480-83 (7th Cir. 1946); United States v. National Malleable & Steel Castings Co., 1957 Trade Cas. (CCH) ¶ 68,890, at 73,588, 73,595, 73,600-01 (N.D. Ohio 1957), *aff'd*, 358 U.S. 38 (1958).

In short, Allied's conspiratorial conduct falls well within the category of traditional restraints of trade with which the Sherman Act is vitally concerned. By the same token, the conspiracy was *not* political activity which merely petitioned the government to restrain.

3. The Conspiracy Did Not Constitute Petitioning of Government

Allied's conspiracy to subvert NFPA's consensus standard making process and exclude Carlon's product from the market was manifestly not a mere political effort to lobby and persuade state governments to take action favorable to Allied and the other coconspirator steel companies. *Noerr* draws a sharp distinction between the "proscriptions of the [Sherman] Act, tailored as they are for the business world," and the rules properly applicable to "the political arena." 365 U.S. at 141. Allied's conspiracy to corrupt NFPA's code-making processes did not take place in the political arena; nor did it involve political conduct. Petitioner is wide of the mark when it describes its conduct as "lobbying an agency like the NFPA." (Pet. Br. 27). NFPA is not an agency of government; and what Allied and its coconspirators did was not lobbying.

a. NFPA Is Not an Organ of Government

The court of appeals' refusal to extend *Noerr* immunity to "lobbying" activities directed towards so-called "quasi-legislative" bodies properly confined the doctrine's limited applicability to true governmental petitioning. (*See* App. 12a). NFPA, while possessing very substantial power to affect the economic well-being of companies attempting to market products covered by its codes, is a private organization and not an organ of any government.[36]

A private association of competitors taking commercially motivated action with no delegation of any legislative, executive or judicial authority of any kind from any federal, state or municipal government is not clothed with governmental status for *Noerr* purposes simply because organs of government later elect to adopt its code in whole or in part. And for good reason. "We may presume, absent a showing to the contrary, that [a government] acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf." *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 45 (1985).

As the court of appeals acutely observed, bestowing upon private bodies like NFPA governmental status for purposes of *Noerr* immunity would run a grave risk that they will act contrary to the public interest[37]—a risk which the record in this case graphically reveals is very real indeed. That is why concerted efforts to persuade private groups to take anticom-

36 As the court of appeals noted, "Allied has made no claim of any official delegation of governmental power to the NFPA." (App. 12a-13a n.4). And NFPA itself has eschewed any governmental role by stating that it "is *not* an administrative arm of any state or local jurisdiction . . . ." (Decision of NFPA Board of Directors on Appeal of Allied Tube and Conduit Corp., Sept. 26, 1986, at 8) (emphasis in original).

37 "A private organization's agenda often will not coincide with, and may be directly contrary to, the interests of the broader public. Neither the organization, its membership, nor its leadership is checked by any accountability to the general public." (App. 14a).

petitive actions do not constitute the type of political petitioning shielded by the *Noerr* doctrine.[38]

Thus, even if Allied, as it claims (Pet. Br. 24-25), was "attempting to influence a private group whose decisions would . . . have direct . . . influence upon state and local governments," the private nature of NFPA renders efforts to "lobby" before it is ineligible for *Noerr* immunity.

b. Allied's Conduct Was Not Lobbying

Nor was the admitted conspiracy to subvert NFPA's code-making processes effectuated by anything resembling political lobbying in the sense of attempts by constituents to persuade representatives to take desired governmental action. Rather, Allied's conspiracy was designed to "fix" the vote—the antithesis of genuine lobbying in which one seeks to influence the government through persuasion and debate. For petitioner to invoke notions of free speech and open debate is the epitome of irony in light of the undisputed fact that not one of its "troops" spoke at the meeting. As the court of appeals pointedly observed, "[f]ew of Allied's voters had any of the technical documentation necessary to follow the meeting; nor did any of them speak in opposition to Article 331 in the course of the meeting." (App. 8a).

Allied cannot properly characterize its conduct as "getting out the vote" (Pet. Br. 13). What it did was to "create" the vote in the crassest way by intentionally enrolling new NFPA members whose sole task was to attend a meeting, remain glued to their seats until called upon to act and, when instructed to do so by their leaders, cast an uninformed ballot for the "candidate" of Allied's choice. For petitioner to suggest (Pet. Br. 24-25) that this conduct was no more than

38 *See, e.g.*, Feminist Women's Health Center, Inc. v. Mohammad, 586 F.2d 530, 542 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979) (communications within hospital staff as a matter of law unprotected by *Noerr*); United States v. Johns-Manville Corp., 259 F. Supp. 440, 452-54 (E.D. Pa. 1966) (communications before private standard setting association not *Noerr*-protected).

"political advocacy" is to disregard the reality of what happened. Allied's vote-packing conspiracy "influenced" no one other than the purchased voters the conspirators brought to the meeting. If all that Allied did was to urge NFPA's members to reject Carlon's products because of the safety issue, the jury could not have found that NFPA's processes were subverted, and there would have been no unreasonable restraint of trade.

As for Allied's claims that "the effective route to Allied's goal was via the NFPA," that "[e]fforts directly to lobby local governments . . . would be largely futile," and that "parties seeking to be heard with respect to the NEC must join the political process at the NFPA" (Pet. Br. 25), they are refuted by the record. There is ample opportunity to lobby at the legislative level, as both the district court and the court of appeals expressly noted. In the Second Circuit's words:

> Allied's own survey shows that over half the states and cities polled either amended the NEC before adopting it or refused to adopt it at all. As the district court acknowledged, "there is obviously an opportunity to change the mind of the legislature and . . . there is an opportunity for the defendant and the plaintiff to lobby at that level . . . ." (App. 18a-19a).

And the evidence showed that Allied in fact availed itself of that opportunity. (Tr. 1499-1503).

Petitioner argues that its corruption of the standard making process is irrelevant to the *Noerr* calculus because the applicability of the doctrine does not turn on whether dishonest or unethical tactics were used in an effort to lobby organs of government. This misses the point. The publicity campaign in *Noerr*, whatever methods may have been used to implement it, was part of an overall program directed at persuading state governments to enact legislation favorable to the railroads. Here, in stark contrast, Allied organized a private conspiracy outside the political arena directed at an admittedly private body which was barred by law from lobbying activities. Far from trying to persuade anyone, the conspirators stacked the

deck in order to forestall any debate on the merits and thwart the result that would have followed a legitimate vote. Thus, unlike *Noerr*, where the defendants combined solely for the purpose of mounting a campaign directed at the body politic, here competitors misused a trade association already organized and existing for non-political purposes and rigged the association's code which, although held out to the world as the product of an unbiased consensus, was, in fact, anything but. *Cf. American Society of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 456 U.S. 556 (1982).

c. The Conspiracy Caused Independent Marketplace Injury

The *Noerr* doctrine is grounded on the premise that "where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out." 365 U.S. at 136. It follows that a restraint which results directly from private, not governmental, action, is not within *Noerr*'s protection and, if unreasonable, violates the law. When private parties do no more than petition the government to take action which restrains, they are protected by the doctrine; but when they combine to restrain trade themselves, they are not. Put another way, private restraints of trade which a governmental entity may later decide in its discretion to adopt in whole or in part are not sheltered by *Noerr*. And that is precisely the case here. Painfully aware of the critical nature of the point, petitioner asserts that the "actions of Allied in the NFPA did not in themselves have any anticompetitive effect." (Pet. Br. 40). But that assertion is demonstrably incorrect.

Wholly apart from the restraint resulting from the adoption of the NEC by some state and local governments, the exclusion of Carlon's product from the NEC directly restrained trade and injured Carlon by stigmatizing the product throughout the marketplace. This restraint occurred in jurisdictions in which the code was not adopted at all and in jurisdictions where it was adopted with Article 331 included, either by modification

of the NEC before 1984 or as part of the NEC after 1984. The evidence supporting that fact, which was introduced in the "liability" phase of the trial,[39] was more than sufficient to justify the jury's finding that Allied's conspiracy unreasonably restrained trade[40]—as the court of appeals found on two occasions: once in its opinion on the merits and again in denying Allied's petition for rehearing, which focused specifically on this very issue.

The jury found that Carlon's injury flowed from that direct market restraint. The district judge's instruction on the issue could not have been clearer:

> [T]he plaintiff's argument is what happened in May 1980 has created a certain stigma on the product which has carried through and that the defendants have attempted

39 Allied is therefore incorrect when it states that the direct market impact of the conspiracy was an afterthought introduced for the first time at the damages stage of the trial. (Pet. Br. 39-40).

40 The evidence included the parties' stipulation that "[t]hird party certifiers of electrical equipment such as Underwriters Laboratories will normally not list and label a product without NEC approval" (JX-1 ¶ 31); evidence that many electrical inspectors, contractors and distributors will not use a product if it is not in the NEC or if it does not have an Underwriters Laboratory label (Tr. 145-46, 288-90, 296-97; JX-1 ¶ 32); and proof that underwriters will refuse to insure structures that are not built in conformity with the NEC (Tr. 296-97).

In addition to this evidence in the trial's liability phase, the evidence during the damages phase further proved that Allied marketed the defeat of Article 331 and ENMT's resultant exclusion from the 1981 NEC. (Tr. 2291, 2589-90, 2605-06, 2667-69, 2682, 2724-25, 2727-28; *see* Tr. 3220-21, 3247-50). Indeed, Allied's own witness testified that Allied "was doing everything it could to make sure that as many people as possible found out about the defeat of Article 331," that it took out advertisements and distributed documents to "people in the industry" informing them of the defeat, and that in all of these efforts it never once informed the recipients that the defeat was the result of subversion of the standard-making process. (Tr. 2979-89). While Allied now characterizes this evidence as "trivial" (Pet. Br. 42), it was plainly sufficient to support the jury's findings, which petitioner implicitly conceded when it failed to challenge the damage verdict.

> to market that stigma in the years which have ensued . . . . The plaintiff does not seek damages resulting from any of the defendant's conduct other than its conduct at the May 1980 meeting and its marketing of that defeat in the marketplace. (J.A. 30-31).[41]

In light of the trial court's instructions and the jury's damage finding, the court of appeals was plainly correct in concluding that "Allied's behavior . . . itself caused independent antitrust injury to Carlon . . . ." (App. 17a). That fact of the conspiracy's direct impact disposes of petitioner's argument that the only restraint injuring Carlon was the product of state action protected by the doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943), and its concomitant assertion—equally unfounded—that the anticompetitive conduct which brought about Carlon's injury was no more than petitioning for such state action.[42]

Nor is there any substance to petitioner's reliance on *Hoover* v. *Ronwin*, 466 U.S. 558 (1984). Contrary to Allied's contention, that decision does not extend *Parker* protection to conduct of private parties such as NFPA (much less Allied and its steel conduit coconspirators) merely because the state later chooses to adopt as its own what they have done. *Hoover* holds no more than that there can be no antitrust liability when the sovereign act of the state *alone* restrains trade, even if such state action may have been the product of the concerted

41 The trial court went on to make clear that lobbying activities could not form the predicate of any damage award: "To the extent that the defendant has sought to bring to the public's attention safety questions, to the extent the defendant has sought to legislate—to lobby before legislative bodies or political bodies with respect to the safety question, the plaintiff does not claim any damages from that conduct, and such conduct may not be a proper predicate for you to assess any damages because that type of conduct would be protected and is not a violation of the antitrust laws." (J.A. 31).

42 As the court of appeals noted, citing *Parker*, Carlon did not seek, and the jury did not award, any redress for injury resulting from adoption of the NEC by governmental units. (App. 9a n.3).

conduct of private parties delegated by the state to perform advisory functions.[43]

In short, Allied's reliance on the doctrine of *Parker* v. *Brown*, like its reliance on *Noerr*, stands on the faulty premise that the conspiracy in this case did not directly impact the marketplace and Carlon. Since the jury, under proper instructions, found precisely the contrary, that is the end of the matter.[44]

43 The distinction between *Hoover* and this case is readily apparent. In *Hoover*, an alleged conspiracy among private parties delegated by the state to perform a governmental function ultimately produced a decision by the highest court of the state to deny the plaintiff admission to the bar—a restraint and an injury which only the state could effectuate. Here, in marked contrast, the jury found that a conspiracy among private persons not authorized by any organ of government to perform any governmental function caused a direct market restraint and direct injury to Carlon—effects which would have occurred *whether or not* any organ of government adopted the NEC.

44 In a last ditch argument Allied asserts that the injury caused by the conspiracy was "incidental" to otherwise lawful petitioning and thus not a bar to application of the *Noerr* doctrine. (Pet. Br. 41-42). The point takes Allied nowhere. To begin with, as explained *supra*, the conduct of Allied and its coconspirators was not petitioning of the government within the contemplation of the *Noerr* doctrine. Beyond that, the marketplace injury found by the jury was direct, not incidental. The only injury claimed by the plaintiff truckers in *Noerr* was concededly caused by the governor's veto of proposed legislation. 365 U.S. at 130. The Court's discussion of other possible incidental injury was, thus, unrelated to the claimed damages in that case. Here, on the other hand, the jury awarded damages based on Carlon's direct, reasonably foreseeable and significant marketplace injury in states which did not adopt the conspiratorially polluted NEC and on Allied's conduct in marketing the conspiratorial defeat of Carlon's product at the NFPA meeting. To say that such injury, intentionally inflicted with an admitted purpose to exclude Carlon's competition from the marketplace, was "at most an incidental accompaniment of the Allied campaign for legislative exclusion of ENMT" (Pet. Br. 42) flies in the face of reality.

B. Imposing Antitrust Liability for Allied's Concerted Subversion of the Consensus Standard Making Process Is Necessary to Preserve the Process's Social Utility and Will Not Stifle Uninhibited Debate

Allied would have the Court believe that applying the Sherman Act to its blatantly anticompetitive conduct would "undervalue[ ] the role of code-making bodies in the political process" and would have a "chilling effect . . . on code-making activities." (Pet. Br. 31). Far from undervaluing the importance of private code-making, the Second Circuit sought to protect that vital function from the abuse that this record reveals would be all too easy to accomplish in the absence of antitrust regulation.

Petitioner's essay on the unquestioned importance of trade associations in "creating, through internal bargaining and the winnowing of options, a consensus that can be presented to political decision makers" (Pet. Br. 32) has a hollow ring against the background of Allied's conduct here. Petitioner and its steel conduit coconspirators made a mockery of NFPA's consensus standard making procedures and thwarted the true consensus that NFPA would have reached but for Allied's vote packing. It is especially because so many people, including a number of governmental organs, rely on the standard making activities of associations such as NFPA, and because such associations render valuable civic services,[45] that the antitrust laws should be applied to protect the process from subversion.

45 The Ninth Circuit's statement to that effect in Sessions Tank Liners, Inc. v. Joor Mfg., Inc., 827 F.2d 458, 463-64 (9th Cir. 1987), is correct; but as that court itself recognized in concluding that Allied's conduct here should not be protected by the *Noerr* doctrine because of the sham exception (*id.* at 465), the importance of that civic function requires that the process of consensus standard making be protected from the type of subversion revealed by this record—protection that can be provided only by application of the antitrust laws. Significantly, the trade association involved in *Sessions* limits its voting membership to public officials (*see id.* at 461), so that the type of vote-packing conspiracy involved in this case could not be effectuated there.

In the usual case of legislative petitioning—exemplified by *Noerr* itself—the legislature expects to receive partisan views from all areas of the citizenry and is in a position to assess their relative merits and reach a governmental decision. But partisanship is the antithesis of legitimate private standard making, since both government and private citizens alike expect privately promulgated codes to be the unbiased product of genuine consensus on the merits. The government's very need to rely on private parties to weigh the evidence and arrive at appropriate safety standards makes it critical for the process to be objective and for standards to be arrived at on the merits free from anticompetitive bias. When NFPA adopted the NEC without Article 331, the legislatures and organs of local government, accustomed to accepting such codes as the product of true consensus, were intentionally misled.[46] They did not receive the benefit of the "full and vigorous participation in the code-making process" that Allied proclaims is vital. (Pet. Br. 35).

As for petitioner's suggestion that application of the Sherman Act to its conduct would "stifle uninhibited debate" (Pet. Br. 31), it is pure fantasy. No one claims that Allied should have been restrained in any way from expressing its views, either within or outside NFPA. The fact is that Allied did not engage in any discussion or debate at the May 1980 meeting at which it fixed the vote. Debate was unnecessary because the outcome was preordained. The decision below in no way limits anyone's right to debate or express an opinion as to the safety or suitability of any product on any occasion. Allied's rhetoric cannot transform this vote-packing conspiracy—with its "battle plan" to enlist hundreds of know-nothing "bodies" and give

46 In a very real sense, what Allied and its coconspirators did was to perpetrate a fraud on the state and local governments they now say they were legitimately trying to influence. *Cf.* Stewart v. Wyoming Cattle Ranche Co., 128 U.S. 383, 388 (1888) ("The gist of the action is fraudulently producing a false impression upon the mind of the other party"). For Allied to state that it "deceived no one" (Pet. Br. 14), "spoke the truth and misrepresented nothing" (Pet. Br. 46) is thus, to say the least, disingenuous.

them "instructions" on how to vote—into a "robust and wide-open debate" involving "advocacy." (Pet. Br. 34). In light of the fact that not a single one of Allied's executives or "troops" spoke at the May 1980 meeting in opposition to Article 331, it is fatuous to suggest that application of the Sherman Act to this conduct will inhibit debate by anyone. Allied's invocation of the "traditional democratic process" (Pet. Br. 35) reflects a unique view of America's heritage. Our Nation's democratic tradition calls for free and fair elections, not stuffing the ballot box.[47]

Finally, Allied half-heartedly suggests that its conduct might be protected by the First Amendment. (Pet. Br. 49-50). That notion has no substance whatsoever. Even if one were to view Allied's conspiracy as, to some extent, an association "for expressive purposes," applying the Sherman Act to it would cause only an "incidental abridgment" of First Amendment rights to expressive association "no greater than is necessary to accomplish the [Sherman Act's] legitimate purposes." *Roberts* v. *United States Jaycees*, 468 U.S. 609, 628 (1984). *See California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 514-15 (1972) ("It is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute"), citing *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) (state may constitutionally prohibit, under general prohibition of conspiracies in restraint of trade, a union's truthful and peaceful picketing).[48]

47 Allied has the temerity to suggest that its conduct was nothing more than traditional politics and that Carlon should have engaged in the same subversive tactics. (Pet. Br. 35). How the creation of uninformed and uninterested "voters" by both sides in a standards debate is supposed to produce an objective safety standard on which anyone may rely remains a mystery.

48 *See also* City of Los Angeles v. Preferred Commun., Inc., 476 U.S. 488, 106 S.Ct. 2034, 2038 (1986) ("where speech and conduct are joined in a single course of action, the First Amendment values must be balanced against competing societal interests").

To confer *Noerr*'s antitrust immunity upon Allied's egregious subversion of consensus standard making would, as a practical matter, remove the Sherman Act's protection from all aspects of the standard making process whenever the resulting standards are ultimately adopted by some organ of government. Since there are thousands of privately issued standards covering a vast array of products,[49] many of which are adopted in whole or in part by governmental units, application of *Noerr* to legitimize Allied's conspiracy would enable members of private organizations that are "rife with opportunities for anticompetitive activity"[50] to seize such opportunities in order to injure their rivals and deprive the public of new, innovative and more economical products. That, of course, is precisely what happened in this case.

What is more, immunizing Allied's conduct would seriously undermine the credibility of standard making throughout the economy and thus deprive the public of its benefits. For the public could never know whether standards generated by trade associations are the product of a true consensus on the merits or whether, as here, they are simply the result of economically motivated private combinations of competitors who have subverted the process for their own anticompetitive ends.[51]

In the final analysis, Allied's invocation of the influential role played by standard making bodies in the economy as a justification for its subversion of the consensus standard making process is supremely ironic. The *Noerr* doctrine, narrowly crafted to preserve the right to petition the *government*, is not so perverse as to license private combinations to deprive the public of new products by subverting *private* industry codes. Nothing in the opinion below infringes Allied's, or anyone

49 *See* Pet. Br. 33: "More than 420 private organizations now participate in promulgating some 32,000 codes and standards." *See* American Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., *supra*, 456 U.S. at 559.

50 American Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., *supra*, 456 U.S. at 571.

51 *See generally*, brief *amicus* of New York and other states.

else's, right to debate a product's merits or petition the government to act on its behalf. The only conduct that the decision will "inhibit" is conspiracies in unreasonable restraint of trade which exclude rivals from the marketplace by subverting standard making procedures,[52] thus "impair[ing] the ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal costs of providing them." *FTC* v. *Indiana Federation of Dentists*, 476 U.S. 447, 106 S. Ct. 2009, 2018 (1986).

C. If Otherwise within the *Noerr* doctrine, Allied's Conduct Falls Squarely within the Sham Exception

If, contrary to our submission, Allied's conspiracy to subvert NFPA's standard making process were deemed to constitute solicitation of governmental action within the meaning of *Noerr*, the shield of the doctrine would still not protect it because it would then fall squarely within *Noerr*'s sham exception.

The sham exception embraces the entire spectrum of improper activities which, in the guise of petitioning, abuse or corrupt governmental processes to further anticompetitive goals. *See, e.g., California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 513 (1972); *Litton Systems, Inc.* v. *American Telephone & Telegraph Co.*, 700 F.2d 785, 809-12 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984); *Israel* v. *Baxter Labs., Inc.*, 466 F.2d 272, 278-79 (D.C. Cir. 1972).

That Allied abused NFPA's processes is beyond dispute. The jury specifically found that it subverted the Association's standard making process, a finding with overwhelming evidentiary support in the record. Allied's protestations that it "genuinely" sought to influence legislation cannot dispel the fact that its conspiracy deprived Carlon of a meaningful vote at the May

52 As the court of appeals noted, petitioner's "conduct 'subverted' the code making process which Allied admits contained an inherent 'potential for abuse.' " (App. 21a).

1980 NFPA meeting.[53] If NFPA's standard making procedures are to be viewed as part of the political process, then the deliberate dilution of the nonconspirators' votes by virtue of Allied's conspiratorial vote-packing plan constitutes an abuse of the worst kind. And that is precisely what the Ninth Circuit concluded in *Sessions Tank Liners, Inc.* v. *Joor Manufacturing, Inc.*, 827 F.2d 458, 465 (9th Cir. 1987). While taking what we submit is too broad a view of the *Noerr* doctrine, the Ninth Circuit nonetheless had no hesitation in concluding that Allied's conduct forfeited the doctrine's protection because it was a sham.[54]

Whatever the rubric, when all is said and done the result is the same and straightforward: The law does not provide a shield, in the guise of governmental "petitioning," for anticompetitive perversions of consensus standard making by competitors conspiring to exclude the products of their rivals from the marketplace. That was the essence of the court of appeals' decision below. It was eminently correct and should be affirmed.

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53 *See* California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 511 (1972).

54 Significantly, the *amicus* brief on behalf of The Western Fire Chiefs Association (and three other associations), while styled in support of petitioner, in fact does not argue for application of *Noerr* immunity on the facts of this case. Rather, those *amici* assert that the Court should adopt the view of the Ninth Circuit in *Sessions* and "regulate abuses of the [standard making] process through the sham exception." Brief of Western Firechiefs Association *et al.* as *amici curiae* at 4; *see also id.* at 19 ("Excepting 'inappropriate' or 'improper' lobbying activities from *Noerr-Pennington* protection by invoking the sham exception is an effective way of regulating subterfuge of the political process. The sham exception precludes the possibility that *any* activity, whether it is model code-making or otherwise, may be totally exempt from antitrust scrutiny").

II.

THERE BEING NO *NOERR* IMMUNITY, THE JURY'S FINDING THAT ALLIED'S VOTE-STACKING CONSPIRACY UNREASONABLY RESTRAINED TRADE IS AMPLY SUPPORTED BY THE EVIDENCE

The inapplicability of the *Noerr* doctrine to concerted subversion of an association's code-making process does not mean that the Sherman Act will invariably be applied to stifle that process and deprive the public of the very real benefits of consensus standard making. For the fact that standard making by a trade association may have an injurious effect on competition does not necessarily make the concerted conduct unlawful. It becomes unlawful only if found by the trier of fact to be unreasonable in all the circumstances.[55] The jury in this case properly applied the Rule of Reason in finding that the antitrust laws had been violated; and there is no legal infirmity in that finding.

Petitioner concedes that "[s]ince *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918), this Court and the lower courts have consistently applied the Rule of Reason to Sherman Act claims arising out of certification, standardization, and self-regulation programs of trade associations that do not involve boycotting, price fixing or market division" (Pet. Br. 42-43). That concession provides the complete answer to Allied's argument that the jury's finding of an unreasonable restraint here is somehow legally erroneous. There is no dispute that the trial court correctly instructed the jury on the elements of the Rule of Reason; and, considering all of the evidence, the jury concluded that the conspiracy's anticompetitive effect in subverting the standard making process and directly restraining competition outweighed whatever procompetitive justifications there might ordinarily be for consensus standard making.

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55 Neither the district court nor the court of appeals so much as suggested that a rule of *per se* illegality should be applicable here; and Carlon takes no such position in this Court.

Under the Rule of Reason, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977). This factfinding process requires "a determination of whether an agreement is on balance an unreasonable restraint of trade, that is, whether its anticompetitive effects outweigh its pro-competitive effects." *Columbia Broadcasting System, Inc.* v. *American Society of Composers, Authors and Publishers*, 620 F.2d 930, 934 (2d Cir. 1980), *cert. denied*, 450 U.S. 970 (1981). The only limitation is that the inquiry must be "confined to a consideration of [the restraint's] impact on competitive conditions." *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 690 (1978). The district court put precisely that inquiry to the jury.[56] Weighing the procompetitive benefits usually ascribed to standard making—the dissemination of product information which is valuable only to the extent that it results from an untainted consensus—against the anticompetitive effect resulting from the fact that the Association's processes had been subverted, the jury found an unreasonable restraint of trade.[57]

It is no answer for Allied to argue that "Carlon's concession at trial that the safety standard sought by Allied was supported by objective scientific evidence" (Pet. Br. 44) somehow undermines the jury's Rule-of-Reason verdict. All that Carlon conceded was that there was objective evidence on *both* sides of

56 The district judge instructed the jury, *inter alia*, that "[y]ou have to decide whether or not the pro-competitive aspect of the defendant's conduct in this case and the standard making process, which was involved in this case, as such outweigh any anticompetitive aspect." (Tr. 2168).

57 The jury's subversion finding alone was sufficient to warrant a judgment under the Sherman Act for Carlon. For Allied's own expert witness testified that voting on a product standard without regard to the product's merits—which is exactly what Allied's "troops" were enlisted to do—would eliminate the procompetitive value usually associated with the standard making process. (Tr. 1571-73).

the dispute and that reasonable people could differ. The issue, in short, was debatable.[58] But, as a result of Allied's concerted conduct, fair and open debate was frustrated. To characterize Allied's acts as no more than the "dissemination" of truthful information (Pet. Br. 44) ignores what happened—a bald conspiracy to exclude replete with vote creation and ballot stuffing. It is small wonder that the jury characterized this as a subversion of the standard making process.

Nor does it advance petitioner's case to argue (Pet. Br. 46-49) that its compliance with NFPA's rules and the so-called "procedural fairness" of the proceedings negates the jury's restraint of trade determination. The presence or absence of "procedural safeguards" is an antitrust irrelevancy. *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985). It is settled law that a trade association's rules may themselves violate the Sherman Act;[59] and it follows that it is no defense to a Sherman Act charge that there was no violation of an association's rules. Indeed, if compliance with the association's rules were all that is required to avoid Sherman Act liability, there would be nothing to stop association members from enacting rules expressly permitting the very type of brazen anticompetitive behavior that occurred here.

As for "procedural fairness," it ill behooves Allied, whose conduct polluted the NFPA proceedings from top to bottom, to talk about the fairness of the association's procedures. Allied did substantially more than act "unethically in its

58 As a matter of law safety considerations cannot legitimize an otherwise unlawful conspiracy in unreasonable restraint of trade. National Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679, 693-96 (1978). In any event, the scientific view proffered by Carlon ultimately prevailed, and today Carlon's product is in the NEC with no meaningful restrictions.

59 *E.g.*, Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332 (1982); National Soc'y of Prof. Eng'rs v. United States, *supra*, 435 U.S. at 692-96; Associated Press v. United States, 326 U.S. 1, 14-19 (1945); Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 47-49 (1912).

campaign to have the NFPA adopt a scientifically supportable safety standard." (Pet. Br. 47). It corrupted the association and produced a code which was demonstrably *not* the product of unbiased and objective consensus—all for the purpose and with the direct and foreseeable effect of excluding Carlon's product from the marketplace. Once pretensions of *Noerr* immunity are stripped aside, this conspiracy stands as a classic unreasonable restraint of trade. The jury so found, and its finding is fully supported by the evidence.

CONCLUSION

For all the reasons stated above, the judgment of the court of appeals should be affirmed in all respects.

Dated: December 31, 1987
New York, New York

Respectfully submitted,

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FILED
JAN 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-157

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALLIED TUBE & CONDUIT CORPORATION,

Petitioner,

vs.

INDIAN HEAD, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-157

ALLIED TUBE & CONDUIT CORPORATION,

Petitioner,

vs.

INDIAN HEAD, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

As the Ninth Circuit has accurately seen, the decision of the Second Circuit in this case would expose defendants to liability for treble damages "simply for bringing forward undisputed evidence that a rival's product is actually hazardous." *Sessions Tank Liners, Inc. v. Joor Manufacturing, Inc.*, 827 F.2d 458, 466 n.6 (9th Cir. 1987). Allied acted on a genuine and scientifically well founded belief that ENMT was indeed hazardous. It is the extraordinary liability imposed in this setting that led to the broad first question on which certiorari was granted. Our significant contention—that, as the Ninth Circuit said, "[t]he *Noerr* doctrine exists precisely to prohibit such a result" (*id.*)—must be retrieved from the heavy rhetoric heaped upon it by Carlon. The important *Noerr* question presented has nothing to do with Allied's specific tactics; those, if they are reached, may raise the question of "sham" or other *Noerr* limitations. But the first, significant question would be no different if Allied had merely joined with other manufacturers in a pamphlet that persuaded the NFPA, correctly or not, to exclude ENMT because it was hazardous. The question would still be whether that concerted action was outside *Noerr*'s doctrine because the NFPA is not a government agency and addressing the NFPA is not "petitioning the government."

The inflamed rhetoric—a "blatant conspiracy" to create a "polluted" code (Resp. Br. 21; *see also* 4-5, 17), the "corruption" of the process (*id.* 25, 28), and similar language—is of a piece with the "conflated" reasoning the Ninth Circuit accurately identified in the opinion of the Second (*see* 827 F.2d at 465), garbling the affirmative meaning of *Noerr* with questions about the "sham" exception. Recalling that danger, we reply in order to the separable contentions touching these separable issues.

1. Combined Interests Associated in a Standard-Setting Agency for Purposes of Supporting and Voting for Standards To Be Adopted as Legislation Are Within *Noerr*

The briefs of Carlon and the *amici* supporting it dwell at length on the fact that the NFPA is not a government agency, and argue from this that the "indirect" seeking of legislation through adoption of the NEC is outside *Noerr*. The *Noerr* doctrine, it is said, applies only to direct "petitioning of government" (*e.g.*, Resp. Br. 20-23, 27-29; S.G. Br. 12-15). This is another instance when concepts like "direct" and "indirect" serve to cloud rather than illumine a legal problem. The proposed limitation of *Noerr* to "direct" "petitioning" misreads that decision and, more importantly, the principles of First Amendment and antitrust law for which it stands. *Noerr* on its facts repels the notion that efforts to achieve legislative results "indirectly" are outside its purview. The activities there held immune against attack under the Sherman Act were far more "indirect," and more distant from the legislature, than the conduct here in question.

Noerr held in terms that the "right of petition" would be impaired by imposing Sherman Act liability upon "mere solicitation of governmental action with respect to the passage and enforcement of laws." *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961). But the Court also rejected more broadly an attempt to "impute to the Sherman Act a purpose to regulate, not business activity, but

political activity, a purpose which would have no basis whatever in the legislative history of the Act." *Id.* at 137. In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), the Court made clear that the *Noerr* doctrine was based on both "the rights of association and of petition." *Id.* at 510.

The right of association is closely linked to the right of petition and the other provisions of the First Amendment:

> It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, . . . and therefore are united in the First Article's assurance.

Thomas v. Collins, 323 U.S. 516, 530 (1945) (citation omitted). When these rights are implicated, even indirectly, attempted governmental regulation must be closely examined. This Court has rejected attempts to limit the categories of constitutional protection by subsuming First Amendment activity "under a narrow, literal conception of freedom of speech, petition or assembly." *NAACP v. Button*, 371 U.S. 415, 430 (1963).

In light of First Amendment principles and the actual ruling in *Noerr*, the cramped reading offered by Carlon and its supporters cannot be sustained. The underlying facts of the *Noerr* case leave no doubt that the protections of its doctrine were not intended to be limited strictly to lobbying in the legislative halls or other direct "petitioning," but embrace a far broader range of political activity aimed at ultimately influencing legislation.

The conduct of the railroads deemed protected in *Noerr* consisted of a " 'vicious, corrupt, and fraudulent' " public relations campaign that went far beyond direct, literal petitioning of the government. *Noerr*, 365 U.S. at 129. The broad sweep and somewhat savage character of that conduct, and its aim at targets far removed from the legislature, were detailed

by the lower courts. The court of appeals affirmed the district court's finding that the defendant railroad association and others were in a "large ever-growing conspiracy . . . to injure and/or destroy the long haul trucking industry," and that

> *the main means used to attain such end was primarily a campaign designed to destroy the good will of the truckers and to instigate and foster government restrictions by creating public hostility* to the truckers, bringing this to the attention of the various legislatures, then proposing legislation crippling to the trucking industry and favored by the Railroads, all under the guise of public spirited organizations and with the defendants' interest concealed.

Noerr Motor Freight, Inc. v. Eastern Railroad Presidents Conference, 273 F.2d 218, 220 (3d Cir. 1959) (emphasis added), *rev'd*, 365 U.S. 127 (1961).

That description of the facts concurrently found by the district and circuit courts exposes the error in Carlon's narrowly blinkered conception that the doctrine of *Noerr* applies only to "petitioning the government" directly. If anything, as the quoted findings indicate, the "main means" employed "primarily" in *Noerr* was a campaign addressed to public opinion and to destroying the good will of the truckers' customers and potential customers. Nevertheless, since those forces were marshalled with the purpose of affecting legislation, the historic result excluding Sherman Act liability was established by this Court. Viewed in this factual context, the result in *Noerr* extends well beyond mere "petitioning" to protect a full range of associational activities, ethical or unethical, employed in the political arena.

Moreover, as the court of appeals had made clear, the wide array of means employed by the railroads and their collaborators were themselves intrinsically illegal apart from the Sherman Act—notably the railroad association's deceptive behind-the-scenes campaign used as a means of "concealing their own adroit manipulation." *Id.* at 220 n.2. All of that, in striking contrast with the open conduct here in question—conduct that violated no rules and broke no laws—highlights

the extremely narrow misconception by which respondent and *amici* allied with it measure the meaning of *Noerr*.[1]

2. Allied's Conduct in Lobbying the NFPA Is Correctly Viewed as Political Activity Within the Scope of the *Noerr* Doctrine

As the district judge made clear, this case is about tactics in a voting situation—the massing of favorable voters for a critical, though not a decisive, vote—that have their familiar counterparts throughout the "political arena." That arena includes votes in clubs, corporations, partnerships and other associations as well as in elections for government office. And the goal, plainly and effectively sought by Allied, was legislation adopting the NEC.

We have here, as the NFPA describes it for its members, including Carlon and Allied, a known and fully understood process in which competing "interests have the privilege of designating their representatives and instructing them how to vote" (A. 1990). Carlon makes a self-defeating effort (Resp. Br. 36) to characterize Allied's conduct as deceptive because of the allegedly blind reliance of local governments and industry participants upon the NEC as an objective, non-political code. However, Carlon elsewhere devotes a special point to showing the widespread industry concern over Allied's tactics at the NFPA meeting (*id.* at 9-10)—leaving no doubt that industry participants were well aware of Carlon's objections to what

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1 The Antitrust Division takes a broader view of the *Noerr* doctrine than is reflected in the Solicitor General's brief in this case. In November 1987, the Department of Justice responded to a request for a statement of its antitrust enforcement intentions with respect to the "formation and operation" of a coalition of chemical and railroad companies to engage in joint conduct to evaluate and comment upon issues concerning the transportation of hazardous materials by rail. In announcing that it would not challenge the proposal under the antitrust laws, the Department stated that the coalition's activities, which include but are not limited to commenting on legislative and regulatory proposals, "appear to be protected under the Noerr-Pennington doctrine," so long as they do not violate traditional antitrust concerns regarding discussion of prices or "other competitively sensitive matters." Dept. of Justice, Press Release No. 87-417 (Nov. 20, 1987).

Allied had done at that meeting. The record shows a robust and wide open process of debate, voting, and publicity. The NFPA's description of itself reflects a general understanding to this effect, disclosing a known arrangement that this is a forum where competing interests meet and contend. The NFPA proclaims "the democratic process under which the NEC is developed" (A. 1987), the NEC's function to "protect lives and property" (*id.*), its "consensus procedures representing a balance of interests and opportunity for review and comment at all levels" (A. 1988), and its foundation "on voluntary participation, procedural fairness, and cooperative effort between government and the private sector" (*id.*).

These central facts tend to be obscured in Carlon's rhetoric and citation of cases about price-fixing, boycotts, and other (irrelevant) per se violations of the Sherman Act. The inquiry is not advanced by talk of an "admitted" and "blatant conspiracy" (Resp. Br. 4, 21) when the record references are only to an "admitted" understanding that Allied would marshal members as it did. Similarly unhelpful are references to a "polluted" code (*id.* at 18, 21), "corruption" of the process (*id.* 25, 28), "stuffing the ballot box" (*id.* at 35), and "rigging" (*id.* 5, 17, 18, 19) or "fixing" the vote (*id.* at 27, 34), which distort the nature and context of Allied's conduct as reflected in the record. And insofar as Carlon culls warlike words from the record—"troops" and "bodies" "enlist[ed]" as part of the "battle plan" (*id.* at 27, 34-35)—those defeat Carlon's purpose; words like these echo, and in fact are, the familiar language of politics.[2]

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2 For example, on the eve of the 1984 election, a political analyst commenting on a close congressional race in Mississippi stated: "The whole race is going to come down to get out the vote—who can get their troops out." "Blacks, Hispanics Trying to Hold Own in Congress," Associated Press, Oct. 30, 1984 (available on NEXIS). In 1984, the campaign of Walter Mondale assembled 3,500 precinct captains to "churn out participants" for the Iowa caucuses. "Mondale Troops Get Out the Vote," United Press International, Feb. 19, 1984 (available on NEXIS). And a report on current caucuses noted that Republican presidential candidate Pat Robertson had achieved success at state party conferences through his ability "to pack meetings." "Robertson Registers Two Victories at G.O.P. Gathering in Virginia," N.Y. Times, Dec. 7, 1987, at A29, col. 1 (available on NEXIS).

The actual *actions* of Allied in fact closely resemble tactics familiar in the political process, whether in contests for public office, for corporate control, or for other kinds of organizational power. What Allied did, obeying lawful rules, was simply to "get out the vote" in an interim election. Political analogies come quickly to mind.

As this case is being briefed, almost a score of candidates and their workers are scouring Iowa, New Hampshire and much of the South to "get out the vote." No one will ask any voter's rationale or knowledge of the issues. But the votes will count. At the same time, these interim votes will not be decisive. The process continues to decisions at national conventions. Similarly, the May 1980 NFPA membership vote, the entire basis of Carlon's claim, was unquestionably important, but not decisive. The rules allowed Allied to get out the vote exactly as it did. As the jury found, that vote did not "effectively determine whether Article 331 would be excluded from the NEC" (Question No. 6, J.A. 24). On the contrary, as the next finding shows, the procedural regulations were "fair in that they provided a full and effective appeal from the vote of the membership" (Question No. 7, J.A. 24). As the jury also found, Allied's actions did not "deprive Carlon of full and effective access to the NFPA" (Question No. 8, J.A. 24).

In sum, Allied's political conduct is not meaningfully distinguished from the protected political conduct in *Noerr*. Ethically it was surely on a higher plane. And it bears no likeness to a classic antitrust violation. Carlon nevertheless cites a number of antitrust cases standing for the undisputed proposition that horizontal combinations that act to restrain trade through group boycotts or price-fixing are illegal. None of these cases addresses the *Noerr* doctrine, and none of them concerns conduct the primary goal of which is to influence legislation.[3]

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3 New York's and other States' Attorneys General as *amici* support Carlon with similar string citations to inapposite cases concerning traditional antitrust conduct such as price-fixing, agreements to limit product lines, and boycotts (N.Y. Br. 16). In the same vein, the Solicitor General argues that price-fixing and group boycotts, even if aimed at influencing legislation, are prohibited under the Sherman Act (S.G. Br. 18-19). Even if the proposition were unqualifiedly true, *but see NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), it is not germane.

For example, in *Fashion Originators' Guild of America Inc. v. Federal Trade Commission*, 312 U.S. 457 (1941), textile and garment manufacturers organized a group boycott aimed at deterring design piracy. There was no suggestion that a "conspiracy" to affect *legislation* governing design piracy would have been an antitrust violation. Under *Noerr*, if there had been such a campaign—one aimed at legislation—rather than a group boycott, that campaign would have been protected even if it included public relations and advertising activities aimed at destroying the business of competitors, and even if it included false or misleading material.[4]

Allied's actions in connection with the 1981 NFPA had no resemblance to a boycott, price-fixing or any similar per se offense. The subject was the enlistment of voters and the successful managing of a vote, all in the process of achieving the exclusion of ENMT from the NEC and thus, as a sure consequence, from legislative codes all across the country.[5] The effort was plainly and simply "political" within the principles of *Noerr*, as every court but the Second Circuit has seen in dealing with the NFPA or like processes.

4 Carlon also relies upon *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982), where this Court affirmed a Sherman Act judgment against a trade association based on the manipulation of an industry code by the chairman of a subcommittee of the code-making organization. That individual had acted as he did in order to benefit his own firm, a competitor of the firm whose product he refused to certify. Carlon argues in vain (Resp. Br. 24) that this case of purely private, manipulative, and anticompetitive conduct—analogous to having a judge on the payroll of a litigant, and in no way reflecting any effort to affect legislation—somehow controls the present case. Not surprisingly, the *Noerr* doctrine was never even raised in the *Hydrolevel* case.

5 This central aspect also renders irrelevant *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), a case heavily relied upon by the Solicitor General (S.G. Br. 13-14). In that case, the Court held *Noerr* to be inapplicable because "[r]espondents were engaged in private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws." 370 U.S. at 707.

3. The Principles of *Noerr* Are Not Rendered Inapplicable Because of the "Private" Character of the NFPA

a. *Labels are not the answer*

The briefs for respondent and *amici* supporting it argue at great length that the NFPA is private, not a governmental agency (Resp. Br. 26-27, S.G. Br. 12-15, N.Y. Br. 7-10). Those extended statements of the question shed little or no light on the answer. As the Ninth Circuit observed in *Sessions Tank Liners, Inc. v. Joor Manufacturing, Inc.*, 827 F.2d 458, 462 (9th Cir. 1987), "[t]he labels 'governmental' and 'private' are . . . of limited utility." What is far more to the point, in the pertinent reasoning of the *Sessions* court (*id.*), is that Allied's "efforts were directed at a private association serving as a conduit to local legislatures." Here, as in that case, substituting the NFPA for the organization involved in *Sessions* and Allied for Joor, Allied's

> efforts, albeit directed at an ostensibly private body, were without doubt part of a plan ultimately to procure favorable legislation. . . . The [NFPA], whether designated as "public," "private," or even "quasi-governmental," plays an important and generally accepted role in the legislative process. . . . The [NFPA's] substantial power and the [NEC's] impact on local . . . laws cannot be denied. For this reason the First Amendment right of petition affords protection to those seeking to influence the [NFPA's] decisions.
>
> . . . Rights of association are also implicated . . . . [Allied] was undoubtedly exercising its associational rights when it participated in a private organization to advance its legislative causes, whatever they may have been.

Id. at 463 (citations omitted). Here, as in *Sessions*, *id.* at 468 (citing *California Transport*, 404 U.S. at 513), "the [NFPA] was an indispensable part of the 'political arena.' "

Seen in this light, focusing on political realities rather than labels, Carlon's argument that the NFPA is not a " 'quasi-legislative body' " (Resp. Br. 21 n.32) is at best a straw man.

The broad public that the railroads sought to influence in *Noerr*—with the hope that this influence would be transmitted indirectly to the legislature—was more clearly not a "quasi-legislative body." The NFPA is a more sharply defined, uniquely directed agency to draft and codify provisions that become legislative enactments. It makes sense as a practical matter to speak of "lobbying" the NFPA, but not of "lobbying" the general public. But whatever language is employed, Carlon's formulation ignores that *Noerr* itself was predicated on completely "indirect" pressure. Allied, even more than the railroad association in *Noerr*, intended to influence the political process.

The suggestion of Carlon (Resp. Br. 28) and the Solicitor General (S.G. Br. 9, 12, 16-17 & n.15) that *Noerr* protection for Allied's conduct somehow fails because of the NFPA's tax-exempt status is a pointless detour.[6] Neither brief negotiates the leap from the obvious factual statement that the NFPA does not directly engage in "petitioning" government to the conclusion that Allied's conduct does not constitute a *Noerr*-protected attempt to influence legislation. It is undisputed that the NFPA promulgates the NEC, and that states and local governments widely adopt the code as their own; it is the "most widely disseminated and adopted model code in the world" (Pet. App. 4a-5a & n.1). As the Second Circuit recognized, this process is virtually automatic in a majority of states (*id.*).[7] The sure, effective, and predictable consequence of Allied's successful political activity within the NFPA was to have its message communicated directly to the state legislatures

6 The Solicitor General places special emphasis on this argument that because the NFPA is exempt from federal taxation under Section 501(c)(3) of the Internal Revenue Code and is therefore prohibited from devoting a "substantial part" of its activities to efforts to influence legislation, the NFPA's activities cannot be seen as "petitioning" (S.G. Br. 9, 12, 16-17 & n.15).

7 The Solicitor General mistakes the record when he says (S.G. Br. 17) that Allied's activity within the NFPA was undertaken with "the mere hope or expectation that some government bodies will take notice." The "expectation" in this case was far from "mere;" as a matter of undisputed fact, what the NFPA decides about an issue will assuredly be adopted into law in a majority of jurisdictions, with little or no change.

and, almost routinely, enacted into law. As the Ninth Circuit said of the WFCA in *Sessions*, 827 F.2d at 462, the NFPA is a direct "conduit" to the legislature. Affecting the NFPA was a far more precise and targeted route to legislation than the campaign in *Noerr* to influence general public opinion.

Thus, neither the Internal Revenue Code nor the imaginary question of "petitioning" *by* the NFPA has anything to do with this case. The NFPA's admittedly proper activities of promulgating the code, making it publicly available, and communicating it directly to the several legislatures are the certain and sufficient steps that result in the NEC's wholesale inclusion in the electrical codes of most states and localities.[8]

The indirect "petitioning" protected in *Noerr* had far less likelihood of success than Allied's activities here. If the mere hope of influencing the legislature through the general public may constitute protected indirect petitioning, then *a fortiori* the virtual certainty of influencing the legislature must be considered protected *Noerr* activity.

b. *The far less effective, more costly and more speculative alternative of lobbying hundreds of jurisdictions does not render* Noerr *inapplicable*

In the face of the undisputed record of outright reliance upon the NFPA's product by most state and local governments, Carlon suggests (Resp. Br. 28) that Allied had "ample opportunity to lobby at the legislative level." To support this argument, Carlon quotes language from the Second Circuit's opinion that includes fragments of the district court's decision. Read in context, however, the district court's holding, which takes account of the political realities, is clearly the opposite of Carlon's argument (Pet. App. 25a-26a, emphasis added):

> So we are dealing here with a body which, as plaintiff concedes and defendant concedes, and have conceded

8 It does not diminish but enhances the case for applying *Noerr* to say, as the court of appeals did, that NFPA's "alleged 'quasi-legislative' status results solely from the *de facto* 'delegation' of law-making authority evinced by the extent of the reliance of the various governments upon the NEC" (Pet. App. 13a n.4). The reality of this quasi-legislative status is at the heart of the case.

> throughout this litigation, once they adopt the safety standard, that standard will almost inescapably be followed by the legislatures of the various states. While there is obviously an opportunity to change the mind of the legislature and while obviously there is an opportunity for the defendant and the plaintiff to lobby at that level, both sides seem to agree and have agreed from the inception of this litigation that *the decision of the NFPA will be largely determinative of what the legislatures do*.

Other courts addressing this question have also concluded that *Noerr* applies where approval by a code-making body is tantamount to approval by many government entities. *See, e.g., Sessions*, 827 F.2d at 462-63; *Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit Corp.*, 573 F. Supp. 833, 839-40 (N.D. Ill. 1983); *Rush-Hampton Industries, Inc. v. Home Ventilating Inst.*, 419 F. Supp. 19, 22-23 (M.D. Fla. 1976). Therefore, to the extent that the availability or unavailability of alternative means of pursuing First Amendment activity might be thought a relevant consideration, this factor cuts in Allied's favor. Meaningful access to the code-making process *must* begin at the NFPA, because that is where it largely ends.

But the entire issue of direct petitioning is a diversion in any event, since the possibility of lobbying the legislature directly was certainly available to the railroads in *Noerr* as well. Protection for the railroads' indirect lobbying was in no way conditioned upon their inability to lobby directly. Nobody doubted that the railroads engaged in direct lobbying as well as the concerted campaign away from the legislature that led to the suit against them in *Noerr*. That made no difference there. It should make none here.

4. Code-Making Activity, Itself Efficiency Enhancing and Procompetitive, Would Be Deterred If Sherman Act Liability Were Imposed on Allied in this Case

Carlon acknowledges the importance of the code-making activity of the NFPA: "so many people, including a number of governmental organs, rely on the standard making activities of associations such as the NFPA, and . . . such associations

render valuable civic services" (Resp. Br. 33). But Carlon does not explain how the "valuable civic services" can continue if the adoption of a scientifically valid code can subject participants in the organization to treble damages. If Carlon is correct that Allied's campaign to exclude ENMT from the NEC was unlawful, any industry participation in code-making activity will be at the risk of Sherman Act liability. Such an outcome would deter participation in code-making, injure consumer interests, and impair competition in the marketplace.

a. *Code-making activity promotes values the Sherman Act is designed to protect*

As this Court has often noted, information is an essential requirement in the marketplace:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976).

In gathering, investigating, digesting, and disseminating information about building materials, the NFPA performs a vital task less expensively and more efficiently than individual consumers could.[9] By winnowing out unsafe products or requiring safeguards for their use, certification and standards programs also help reduce the societal costs of such products and serve the goal of efficient resource allocation (Tr. 1556-57).

The drastic impact of the ruling below upon consumer interests and choices is apparent in the stark language of the court of appeals. As the record showed and the jury found (Question No. 1, J.A. 23), Allied acted upon "a genuine belief

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9 Howe and Badger, *The Antitrust Challenge to Non-Profit Certification Organizations: Conflicts of Interest and a Practical Rule of Reason Approach to Certification Programs as Industry-Wide Builders of Competition and Efficiency*, 60 Wash. U.L.Q. 357, 378 (1982).

as of May 1980 that electrical nonmetallic tubing ('ENMT') was unsafe." But that factor, vital to the safety interests of consumers, is set at naught in the decision below, with the brief observation that (Pet. App. 22a) "[t]he 'objective validity' of a restraint has never been a defense to an antitrust charge." That statement, with the inapposite citation to *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927), a price-fixing case, plainly begs the question. As the Ninth Circuit said (*Sessions*, 827 F.2d at 466 n.6):

> Thus *Indian Head* in effect suggests that defendants may owe treble damages simply for bringing forward undisputed evidence that a rival's product is actually hazardous. The *Noerr* doctrine exists precisely to prohibit such a result.

Totally overlooking the procompetitive, information-gathering and purveying functions of the NFPA, and dismissing the entire process as a Sherman Act "restraint," the decision below misconceives and disserves the pertinent antitrust principles as well as the relevant concerns under the First Amendment. It effectively turns the Sherman Act into a weapon to be used against the very values the Act is meant to protect.

b. *Denying* Noerr *protection to Allied's indirect lobbying would deter full participation in the code-making process*

Carlon and *amici* fail to rebut Allied's argument that the imposition of treble damage liability for Allied's indirect petitioning would have a severe chilling effect on these valuable code-making processes (*see* Pet. Br. 27-30). Each brief offers abstract words of comfort on this issue without any analysis or practical insight. Nobody suggests that agencies like the NFPA have broad or total immunity under the Sherman Act. The question is only as to the *Noerr* protection.[10] The briefs supporting Carlon give no useful answer.

10 Carlon suggests (Resp. Br. 36) that recognition of *Noerr*'s application to Allied's conduct would "remove the Sherman Act's protection from

Previous Sherman Act claims involving code-making organizations have involved fraud, untruths, or clear antitrust misconduct unrelated to influencing legislative action, directly or indirectly. By contrast, a refusal to apply the *Noerr* doctrine to Allied's conduct would expose all code-making participants to treble damage liability whenever they vigorously and truthfully advocate a position within a code-making organization through traditional political means.

The claim that no legitimate activity will be deterred is palpably wrong. There can be no comfort in a standard protecting only trade association debate not "tainted" by "collusion" or exclusion of competition. Virtually all standard-making and code-making activity involves a combination of competitors—which can be viewed as "collusion"—and to the extent unsafe products are not approved, every code involves exclusion of a competitor. If that is the test, no industry-wide code-making can occur without the risk of antitrust claims, litigation, and uncertain jury results. The potential that even a *bona fide*, safety-related objection, pressed vigorously but within the rules and without impairing an opponent's access, can lead to antitrust liability or even years of litigation to prove one's innocence belies the notion that code-making will not be deterred and debate chilled.

5. Neither "Sham" Nor Any Other Valid Limitation Can Sustain the Decision Below

It may be arguable that in treating the political process within a nongovernmental standard-setting organization, the *Noerr* doctrine would not extend (as it did in *Noerr*, *see* 365

all aspects of the standard making process whenever the resulting standards are ultimately adopted by some organ of government." But applying the *Noerr* doctrine here obviously would not immunize *all* activity within *all* standard-setting organizations, but would only give elbow room for political activities within such groups where the activities are genuinely motivated by a desire to influence legislation and where the organization operates under fair rules and participants have full and effective access to the decision-making process. It is actually Carlon that proposes an extreme result: a sweeping *exclusion* of all standard-making activities from the *Noerr* doctrine.

U.S. at 140) to concerted actions constituting fraud or deception, illegal in themselves apart from the antitrust laws.[11] The Court may also conclude in a proper case that for conduct relating to such an organization, there must be procedural safeguards to ensure that competitors are not deprived of fair access to the means for affecting legislative or other governmental action. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972); *Silver v. New York Stock Exchange*, 373 U.S. 341, 358-359 (1963). There is undoubtedly room, "under the aegis of the rule of reason," *Silver*, 373 U.S. at 360, for limitations that would preserve the values of free lobbying and political pressures within standard-setting organizations while avoiding expansions of the Sherman Act to embrace unintended cases like this one. The limitations the Court may come to fashion could evolve under "the 'sham' exception in the *Noerr* case, as adapted," *California Transport*, 404 U.S. at 516, or under some different formulation appropriate to new problems as they arise. But there are no grounds for exceptions or exclusions from *Noerr* in this case.

Under the decision of the Second Circuit, the principles of *Noerr*, and the valuable goals served by standard-setting agencies like the NFPA, are sacrificed to a stultifying line drawn against "indirect" means of seeking legislation. In pursuit of its legislative goals, Allied violated no laws. It broke no rules. Carlon, as the jury found, had a "full and effective appeal from the vote of the membership" and "full and effective access to the NFPA" (Questions 7 and 8, J.A. 24). The open-ended standard of "subversion," importing an unacceptably vague commission for judges or juries to apply variant notions of ethics or etiquette, is hardly a sound guide to defining the limits on essentially political conduct. There are, in short, no valid reasons of doctrine or wise antitrust policy for denying the applicability of *Noerr*, and applying the inapposite strictures of the Sherman Act, to Allied's vote-getting actions within the NFPA to achieve the legislative exclusion of ENMT from state and municipal codes.

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11 And it should go without saying that there is no protection under *Noerr* for crimes like "kidnapping a legislator", which is among the subjects addressed in the Solicitor General's amicus brief (S.G. Br. 18-19).

Nor does Allied's conduct come within the sham exception, a question not reached by the court of appeals.[12] Carlon does not dispute the proposition that in cases involving legislative petitioning, the sham exception will virtually never apply. *See, e.g.*, P. Areeda & D. Turner, *Antitrust Law*, ¶ 203.1c, at 11 (Supp. 1986); Handler & DeSevo, *The Noerr Doctrine and Its Sham Exception*, 6 Cardozo L. Rev. 1, 18 (1984). Instead, Carlon cites to cases involving the administrative and adjudicative context, where the exception has broader play. *See, e.g.*, *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972); *Litton Systems, Inc. v. American Telephone & Telegraph Co.*, 700 F.2d 785, 809-12 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984). In *California Transport*, this Court expressly distinguished the legislative setting, in which even unethical lobbying conduct is protected by *Noerr*, from the adjudicatory process, where "unethical conduct . . . often results in sanctions." 404 U.S. at 512. The Court added: "Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." *Id.* at 513.

Carlon cites to no case in which legislative petitioning was held a sham despite a genuine intent to influence the legislature. Lacking such authority, Carlon offers no basis for overturning the district court's clearly correct ruling that Allied's conduct did not constitute a sham but was a genuine attempt to influence the legislative process (Pet. App. 26a).[13]

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12 The "sham" contention, neither decided by the court of appeals nor put before the jury in the district court (*see* A. 95), may be deemed by the Court unsuitable for decision here in the first instance.

13 Even if the sham doctrine were to be given broader scope in the legislative context when industry code-making is at issue, as was perhaps suggested by the Ninth Circuit in *Sessions*, 827 F.2d at 468, it ought not to reach Allied's conduct here. Having established to the jury's satisfaction that it believed Carlon's product to be unsafe, a belief supported by substantial scientific evidence, that it acted on that belief in opposing ENMT, that it followed the NFPA's rules, and that it did not deny Carlon full and effective access to the NFPA, Allied satisfied any realistic test that might be applied to measure "sham" pursuit of legislation.

6. Carlon Did Not Prove Any Independent Marketplace Injury, an Essential Predicate of Its Effort to Escape from *Noerr* and *Parker v. Brown*

Carlon labels as "remarkable" (Resp. Br. 14) our argument that *Noerr* and *Parker v. Brown*, 317 U.S. 341 (1943), read together, require reversal, because Carlon's injury, if any, flowed from legislative enactment of the NFPA. Carlon counters that Allied's conduct caused marketplace injury independent of the legislative enactment of the NEC and protests that its present theory is not "an afterthought introduced for the first time at the damages stage of the trial" (Resp. Br. 30, n.39). The record shows otherwise. Marketplace "stigma" was never Carlon's theory of liability at trial. Further, any incidental evidence of such harm was insignificant, unrelated to the liability issue, and wholly unsupportive of the trebled $3.8 million verdict.

There has been no answer to the demonstration in our main brief (*see* Pet. Br. 7-8, 39) that, from complaint through summation, Carlon was steadfast in asserting that the injury it sued for flowed from legislative enactment of the NEC. Carlon's claim, at the time of the post-trial *Noerr* motion, that it had pursued a different injury theory came as a surprise not only to Allied but also to the district judge:

> THE COURT: I think your theory of damages all along was that your damages flowed from the fact that you were not approved and therefore not adopted by the state legislatures involved.
>
> MR. YERMAN: We had discussions about that.
>
> THE COURT: That was your theory of damages all along. When did you change it? (J.A. 66).

Not only is the attempt to switch theories a departure from the case the district judge "remember[ed] trying" (*id.*),[14] it is

14 Carlon twice cites a portion of the district court's instruction on damages, which, it asserts, proves that the damages Carlon was awarded "flowed from" some independent market injury (Resp. Br. 13 n.26, 30-31). But Carlon cites this fragment out of context. At the time the damage charge was given to the jury, the court had not yet decided whether *Noerr* protected Allied's activities in the NFPA because they influenced legislation. The court had, however, concluded that *Noerr* protected Allied's *direct* lobbying of state legislatures and its publicity campaign designed to influence legislators. The purpose of this portion of the damage charge—as the district judge later explained (J.A. 68)—was to exclude from the jury's calculation of damages evidence that Allied had made presentations directly to legislatures (Tr. 2732-33, 2734-35) and produced booklets for distribution to the public urging contact with legislators (Tr. 2994, 2998).

also in bald contradiction of the jury's answers to the questions on liability. Those answers focused squarely and exclusively on Allied's actions to defeat Article 331 in the May 1980 meeting, and not at all on any notion about "marketing the stigma." Allied's conduct was found to be "a substantial or material factor in excluding Article 331 from the 1981 NEC" (Question No. 9, J.A. 24). It was the "opposition at the May 1980 NFPA meeting" that the jury found to be other than "the least restrictive means" of opposing "use of ENMT in the marketplace" (Question No. 10, J.A. 25). It was "Allied's conduct in opposing Article 331" that was found to "adversely impact competition" (Question No. 11, J.A. 25). The court of appeals was led to a patent error when it moved from these findings to embrace Carlon's baseless claim that liability could be sustained, despite *Parker*, because Allied "marketed the stigma."

Carlon's attempt to rewrite its liability case and show that it suffered independent market harm is a failure. Carlon points to a stipulated fact, misleadingly presented here, and a couple of other record references in its liability case asserted to show that there may have been such independent market harm, namely: the stipulated fact that Underwriters Laboratories ("U.L.") "normally" will not list or label a product without NEC approval; evidence that many inspectors, contractors and distributors will not use a product not listed or labeled by U.L. or the NEC; and evidence that many underwriters will not insure a structure using such an uncertified product (Resp. Br. 11, 29-30, 30 n.40).

Carlon neglects to mention, however, its own evidence that whatever the stipulated "normal" procedure, Carlon succeeded in obtaining an interim U.L. label for ENMT in 1981, the first year the NEC at issue was in effect (PX 342 at p. 4). The existence of that U.L. certification removes the only apparent basis for Carlon's argument that it proved independent marketplace injury.[15]

In sum, the record leaves unsupported Carlon's claim that it tried and proved a case based upon independent market injury. There is no escape from the combined impact upon this case of *Noerr* and *Parker*. The decision below is at war with both.

CONCLUSION

The judgment of the court of appeals should be reversed.

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January 30, 1988

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15 Carlon's evidence in the damages phase of the trial was no less trivial for present purposes. In fact, the evidence showed that in some places where the code was "in effect," Carlon obtained a "variance" (Tr. 2593, 2822). Accor ng to Carlon's witness, "that is the same in that market as being in the National Electric Code" (Tr. 2590).

(7)

Supreme Court, U.S.
FILED
NOV 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-157

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

ALLIED TUBE & CONDUIT CORPORATION,
Petitioner,

vs.

INDIAN HEAD, INC.,
Respondent.

BRIEF OF THE WESTERN FIRE CHIEFS ASSOCIATION, THE INTERNATIONAL CONFERENCE OF BUILDING OFFICIALS, THE SOUTHERN BUILDING CODE CONGRESS INTERNATIONAL, INC., AND THE BUILDING OFFICIALS AND CODE ADMINISTRATORS INTERNATIONAL, INC., AMICI CURIAE IN SUPPORT OF PETITIONER, ALLIED TUBE & CONDUIT CORPORATION

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I

INTEREST OF AMICI CURIAE

Building and safety codes are enacted by states, counties and cities to protect the health and safety of their residents. These codes are highly technical, and require a great deal of time and expertise to develop. The governmental entities which enact such codes often do not have the resources to research, create and update them. In-

stead, the vast majority of such codes are drafted initially as model codes by model code groups. Government relies on the work of the groups, and normally enacts the model codes into law with little or no change.

Amici curiae[1] are four such model code groups, which develop and maintain, update and amend, various building and construction-related codes. The International Conference of Building Officials ("ICBO"), the Building Officials and Code Administrators International, Inc. ("BOCA"), and the Southern Building Code Congress International, Inc. ("SBCCI") are non-profit corporations that promulgate model codes and standards for use by state and local entities. ICBO is the predominant code group west of the Mississippi River, SBCCI predominates in the South and BOCA members predominate in the Northeast and Mid-Atlantic states. The Western Fire Chiefs Association ("WFCA") is a non-profit association that works with ICBO to promulgate the Uniform Fire Code and the Uniform Fire Code Standards in the western states. The voting membership of *amici* is made up entirely of representatives of government. Members of private industry may participate in a non-voting capacity, but only representatives of government — no private industry members — may vote.

Amici curiae are deeply concerned about the continued vitality of the efforts of model code groups to provide to government model codes of the highest quality. Model code groups can achieve that goal only if they receive a full and free flow of information from participants in the model code-making process. The decision of the Second

[1]Pursuant to Rule 36.2 of the Rules of the Supreme Court of the United States, *amici curiae* have concurrently filed with the Clerk the written consent of all parties to this case for *amici curiae* to file this brief in support of petitioner.

Circuit below removed *Noerr-Pennington* protection from participants in that process. The Second Circuit decision, if not reversed or distinguished from the opinion rendered by the Ninth Circuit in *Sessions Tank Liners, Inc. v. Joor Manufacturing, Inc.*, 817 F.2d 458 (1987), will greatly increase the threat of protracted litigation and antitrust damages against participants in the process, and thus inhibit participation in, and the free flow of valuable information to, model code groups. *Amici* submit that *Noerr-Pennington* protection should be afforded to proper efforts to lobby model code groups, and that improper conduct can best be controlled through the "sham" exception to the *Noerr-Pennington* doctrine.

II

SUMMARY OF ARGUMENT

1. Model code groups provide a vital and beneficial public service, and government relies upon them to do so. The vast majority of health and safety codes are drafted initially as model codes by model code groups, and are normally enacted by political subdivisions with little or no change. As a practical matter, any person wishing to change or affect a fire, safety or other building code of a political subdivision starts that process in the relevant code group. The continued vitality of these groups' efforts depends entirely on the ability of their members, and participants from industry and the public, to express freely political views without the threat of protracted antitrust litigation or liability. The increased threat of such litigation can only have the effect of depriving the model code groups of input vital to their decision-making process, from sources that have the expertise, financial ability, and motive to provide such information.

2. The Second Circuit "decline[d] . . . to extend *Noerr-Pennington* immunity to lobbying activities directed toward a 'quasi-legislative' body such as the NFPA,"[2] notwithstanding the ability to regulate abuses of the process through the sham exception. The Second Circuit bases its decision on the fact that model code groups are "private," and that lobbying such groups does not constitute direct petitioning of government. This Court, however, has not limited *Noerr-Pennington* protection to direct petitioning. Indeed, this Court has not placed legal significance on the degree of proximity between the individual seeking to influence governmental action on the one hand, and the legislators on the other hand.

3. The Second Circuit's opinion holds out as the fatal flaw in the model code-making process the natural and inevitable self-interest of private participants. That approach is in direct conflict with this Court's recognition in *Noerr* that "[t]he right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so." *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961). "It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors." *Id.* Indeed, this Court stated that "it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act." *Id.*

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[2] *See Petitioner's* Appendix A at 12a to Petition for Writ of Certiorari (hereinafter "Petition").

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4. The Ninth Circuit and two district courts have followed the *Noerr-Pennington* doctrine by holding that the Sherman Act does not prohibit the lobbying activities inherent in model code-making activity. *Sessions Tank Liners, Inc. v. Joor Manufacturing, Inc.*, 827 F.2d 458 (9th Cir. 1987); *Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit Corp.*, 573 F. Supp. 833 (N.D. Ill. 1983); *Rush-Hampton Industries, Inc. v. Home Ventilating Institute*, 419 F. Supp. 19 (M.D. Fla. 1976). The opinion of the Ninth Circuit in *Sessions Tank Liners* correctly holds that certain improper conduct by participants in model code groups may be subject to *Noerr-Pennington's* "sham" exception. In so holding, the Ninth Circuit provides an effective way of regulating abuses of the process while furthering *Noerr-Pennington's* twin pillars of promoting the free flow of information to the government and protecting the first amendment right to petition the government.

5. Harmful consequences are likely to occur if this Court affirms the Second Circuit's opinion below. A lack of participation by private competitors will greatly reduce the flow of vital information to the model code groups. As a result, inadequate model codes may be enacted into law; a greater number of catastrophes and injuries may occur and governments may lessen their reliance upon model codes. In any event, scarce public resources will have to be reallocated and greatly expanded. Legislators at all levels of government may have to create staffs to research and draft each political subdivision's model codes. Unless regional or national coordination is established by the various political subdivisions, each jurisdiction might adopt different codes, forcing industry to manufacture products to different standards and to build according to different practices, thus increasing the risk of defective products and injuries. Smaller competitors in particular

may be unable to undertake the widespread lobbying efforts necessary to persuade myriad jurisdictions to approve their products or processes. There is no reason to risk such harmful effects, when abuses of the model code-making system can be adequately handled by the sham exception to *Noerr-Pennington*.

III

ARGUMENT

A. The Second Circuit Decision Below Misapprehends the Fundamental Protection Afforded by the *Noerr-Pennington* Doctrine.

The Courts of Appeals for the Ninth Circuit and the Second Circuit have split on their view as to whether model code-making activity is protected by the *Noerr-Pennington*[3] doctrine. The Ninth Circuit held that *Noerr-Pennington* "immunizes proper lobbying — either singly or in combination with others — of a private association engaged in promulgating an important model code to influence legislative and executive decisions." *Sessions Tank Liners, Inc. v. Joor Manufacturing, Inc.*, 827 F.2d 458, 462 (9th Cir. 1987). By contrast, the Second Circuit determined that such groups might act "contrary to the public interest" and therefore held that *Noerr-Pennington* protection should be denied to model code-making activity.[4]

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[3] *See* Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, (1961); United Mine Workers of America v. Pennington, 381 U.S. 657 (1965).

[4] *See* Petition Appendix A at 13a-15a.

Prior to the split between the Courts of Appeals,[5] the law on the application of *Noerr-Pennington* to model code-making activities was clear: Proper activity[6] aimed at influencing the content or passage of legislation was protected, while activity merely incident to legislation was not.[7] The Second Circuit, however, has rejected this

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[5] *Amici* believe that the decision of the Second Circuit can be distinguished from the decision of the Ninth Circuit on the basis that the model code group before the Second Circuit apparently permitted full voting rights to private members of industry, while the WFCA — the model code group before the Ninth Circuit — did not. *See Sessions Tank Liners, Inc., supra*, 827 F.2d at 461 n.2, 466. The Ninth Circuit correctly recognized that the distinction bears on whether an "abuse of process" occurred that would call into play the sham exception to *Noerr-Pennington*, not on whether *Noerr-Pennington* protection should be afforded model code-making activity. *Id.* at 466.

[6] The "sham" exception to the *Noerr-Pennington* doctrine excludes from protection improper activity. *See* Brief of *Amici Curiae*, sec. D *infra*.

[7] A number of decisions which have denied *Noerr-Pennington* protection illustrate that the central inquiry is whether the activity in question is genuinely intended to influence the passage or content of legislation. In Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962), for example, this Court denied *Noerr-Pennington* protection to a U.S. corporation which argued that the activities of its wholly owned subsidiary — which had been appointed as the exclusive purchasing agent of a foreign government — were protected. This Court characterized the activity in question as "private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws." 370 U.S. at 707. Similarly, in Feminist Women's Health Center, Inc. v. Mohammad, 586 F.2d 530 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979), the lower court afforded *Noerr-Pennington* protection to members of a medical society on the ground that it was "an integral part[ ] of the state's apparatus for regulating the practice of medicine," but the Fifth Circuit reversed finding that, while "[h]ospital medical staffs and medical societies play an important role in Florida's regulatory scheme, . . . that role is not a governmental one." 586 F.2d at 543, 545.

simple distinction and has sent a chilling message to model code groups throughout the country. By denying *Noerr-Pennington* protection to model code-making activity, the Second Circuit has stripped fundamental and vintage government petitioning of its constitutional protection. The Second Circuit has held, in effect, that *Noerr-Pennington* does not even protect the good faith and accurate assertion of claims involving product safety to a model code group; a party may be threatened by treble damage litigation even where it has served the public interest by accurately pointing out that a competitor's product is unsafe. *See Sessions Tank Liners,* 827 F.2d at 466 n.6.

B. Model Code Groups Provide a Vital and Beneficial Public Service, and Government Relies Upon Them to Do So.

As a practical matter, states and their political subdivisions have delegated to model code groups like ICBO, SBBCI, BOCA and WFCA the task of developing building and fire-safety codes. Such work requires a tremendous amount of time, money and expertise.[8] Smaller

In addition, a number of cases hold that submissions and filings required by law do not receive *Noerr-Pennington* protection simply because governmental action is an incident to legally-required regulation. *See, e.g.,* Cantor v. Detroit Edison Co., 428 U.S. 579, 601-03 (1976); Litton Sys., Inc. v. American Tel. & Tel. Co., 700 F.2d 785 (2d Cir. 1983), *cert. denied,* 464 U.S. 1073 (1984); City of Kirkwood v. Union Electric Co., 671 F.2d 1173 (8th Cir. 1982), *cert. denied,* 459 U.S. 1170, 1180-81 (1983).

[8]The extent of model code-making activity is enormous. Some 32,000 codes and standards have been promulgated by over 420 private organizations. National Bureau of Standards, Special Pub. No. 681, *Standards Activities of Organizations in the United States* 1 (Aug. 1984). Government regulations incorporate many codes and standards by reference. See, e.g., 29 C.F.R. § 1910.66(c)(22)(i)

jurisdictions do not have the staff or funds to develop their own codes, and often adopt the model codes with little or no change.[9] Larger jurisdictions, such as states or counties, might have the staff, but would be forced to reallocate their resources, and fail to provide other vital services if they did not obtain the benefits of the efforts of the model code groups. Industry members play a vital role in this effort by providing expertise gained by research, development and manufacturing experience that may be unavailable to government employees.[10] In addi-

(1986); 33 C.F.R. § 183.435(a)(1) (1986); 42 C.F.R. § 52b.11(b)(3) (1986); 42 C.F.R. § 57.112. app. A, ¶ (e) (1986); 46 C.F.R. § 63.05-85(b)(1986); and 49 C.F.R. § 192.163(e)(1986), all of which incorporate the NEC by reference.

[9]See n.1 to the Second Circuit's opinion below, in which the court points out that as of 1982, the NEC had been adopted without change in 26 of 51 state jurisdictions, and 19 had adopted the NEC with an average of twelve amendments. Of 495 cities surveyed, 232 adopted the NEC as written, and 256 adopted it with an average of eleven amendments. (No information is provided as to the types of amendments made, or the extent of lobbying, if any, of the governmental entities which enacted amendments to the NEC.) As indicated above, the model codes promulgated by *amici* enjoy a similar influence. Contrary to the Second Circuit's conclusion that the NEC study shows that *Noerr-Pennington* protection is unnecessary to protect model code-making activity because competitors can lobby governmental entities directly, *amici* submit that the study establishes the importance of dealing with the model code at its creation, and the impossible effort necessary to lobby literally hundreds or even thousands of separate jurisdictions. Other than the Second Circuit, all of the other courts which have considered this issue have reached the same conclusion. *See infra* note 12 and accompanying text.

[10]See, e.g., G. Stein, *Quake Adds to Agenda For Structural Engineers,* L.A. Times, Oct. 12, 1987, pt. 1 at 3, col. 1, which reports the review of a new model building code adopted in September 1987 by ICBO, one of *amici* herein, toughening earthquake standards. The code was developed by the Structural Engineers Association of

tion, competitors now rely on model codes in developing their products, knowing that the standards adopted will be applied almost universally.

Moreover, if there were no model code organizations, different codes in each political subdivision could create chaos, facing competitors with the impossible task of lobbying hundreds of separate jurisdictions, and forcing them to manufacture products to different standards, thereby causing a far greater risk of unsafe products or building practices slipping through overworked government employees.[11]

Therefore, the model code groups provide a vital and beneficial public service, and the various governmental entities rely upon them to do so. As the district court recognized in this case, any person wishing to change or affect the fire, safety or other building code of a political subdivision must start that political process at the level of the relevant code group.[12]

California. The code took eight years to draft, in a voluntary effort that took an estimated 10,000 hours, at a cost of over $1 million. The article quoted experts who stated that most local jurisdictions west of the Mississippi are expected to adopt the code, and that if the buildings damaged by the recent California earthquake had been built according to the new code, damages would have been at most one tenth of the $177 million estimated.

[11]Indeed, the small competitor with limited resources would be most harmed if forced to engage in extensive lobbying, and to develop and manufacture products according to different specifications. The weakening of model code groups is thus likely to have an anti-competitive effect of strengthening the largest competitors, who can better afford such a burden.

[12]*See* Petition at 13. See also Sessions Tank Liners, Inc. v. Joor Mfg., Inc., 827 F.2d 458, 463 (9th Cir. 1987) ("The WFCA's substantial power and the Code's impact on local fire safety laws cannot be denied."); Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit

The continued vitality of model code groups' efforts to affect legislation depends entirely on the ability of their members, and participants from industry and the public, to express freely political views without the threat of protracted antitrust litigation and treble-damage liability. Without such protection, interested parties would be unlikely to participate in the model code-making process.[13] The repercussions felt first in the model code groups would extend to governmental entities which rely upon the combination of governmental and private efforts that promulgate the model codes. Legislative resources currently allocated to promulgating and adopting these codes would have to be reallocated and greatly expanded and the considerable void in model code-making activity that would result from increased antitrust scrutiny would somehow have to be filled.[14]

C. Proper Activity Designed to Influence the Passage or Content of Legislation is Protected From Antitrust Laws Under the *Noerr-Pennington* Doctrine.

The Second Circuit adopted in essence a mechanical test, permitting *Noerr-Pennington* protection only when individuals "directly" petition the government. The Sec-

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Corp., 573 F. Supp. 833, 838 (N.D. Ill. 1983); Rush-Hampton Indus., Inc. v. Home Ventilating Inst., 419 F. Supp. 19, 22-23 (M.D. Fla. 1976), which reached the same conclusion.

[13]Indeed, *Respondent* Indian Head, Inc. initially joined the NFPA as a defendant in this action. If such associations and their members, who are primarily public employees, face antitrust liability, the "chilling" effect on model code groups could be fatal. Such associations and public employees, who provide a public service with limited resources and no financial incentive, have little reason to continue such service in the face of protracted litigation, attorneys' fees, and possible treble damage verdicts.

[14]*See supra* note 8.

ond Circuit concluded first, that the "quasi-governmental" status of model code groups does not merit *Noerr-Pennington* protection, because such groups are not elected, and thus not directly accountable to the public at large. Second, the Second Circuit held that "indirect" petitioning of government through model code groups is an insufficient basis for protection, simply because it is indirect, and direct petitioning of the relevant political subdivisions is theoretically available. The Second Circuit has created a superficial distinction between individuals who attempt to persuade government through participation in private organizations and individuals who seek government action directly without such association. Nothing in this Court's *Noerr-Pennington* doctrine supports such a distinction. Indeed, this Court's decision in *Noerr* thoroughly dispels any notion that proximity of the individual to the political arena has legal significance in deciding whether *Noerr-Pennington* applies.

A "no-holds-barred fight" erupted in *Noerr* between the well-established railroad industry and the rising trucking industry, both seeking control of a profitable source of income. 365 U.S. at 144. The railroads launched a vicious publicity campaign against the truckers by distributing circulars, making speeches, and writing editorials, magazine articles and memoranda. The lower courts characterized this activity as the "third-party technique," that is, " 'deception of the public, manufacture of bogus sources of reference, [and] distortion of public sources of information' " by "giving propaganda actually circulated by a party in interest the appearance of being spontaneous declarations of independent groups." 365 U.S. at 140 (*quoting in part* from the lower courts' opinion). The use of the "third-party technique" in the railroads' publicity campaign was one reason the lower courts applied the Sherman Act to the railroads' conduct. 365 U.S. at 140.

This Court reversed, holding that although the publicity campaign was directed to the public at large, it was a genuine effort to influence legislation, and thus constitutionally protected. 365 U.S. at 144-45.

> [W]hatever its purpose, we have come to the conclusion that the reliance of the lower courts upon this factor was misplaced and that the railroads' use of the third-party technique was, so far as the Sherman Act is concerned, legally irrelevant.

365 U.S. at 142.

That such a method may afford opportunity to injure a competitor does not take the case out of *Noerr-Pennington*. Another reason the lower courts applied the Sherman Act to the railroads' activity in *Noerr* was that it found that " *'[i]t was the purpose and intent [of the railroads] . . . to hurt the truckers in every way possible even though they secured no legislation.'* " 365 U.S. at 142 (*quoting* from the lower courts' opinion). This Court rejected the rationale:

> It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed. And it seems equally inevitable that those conducting the campaign would be aware of, and possibly even pleased by, the prospect of such injury. To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns.

365 U.S. at 143-44.

Following *Noerr*, the Ninth Circuit in *Sessions Tank Liners, supra*, held that model code-making activity is *Noerr-Pennington* protected. In that case, plaintiff alleged

that Joor Manufacturing ("Joor") violated the Sherman Act, 15 U.S.C. sections 1 and 2, by persuading the Western Fire Chiefs Association ("WFCA"), one of *amici* herein, to amend its Uniform Fire Code to prohibit plaintiff's process of repairing leaks in underground storage tanks. The Ninth Circuit, affirming the district court, held that "legitimate efforts to influence or lobby private, model code associations *are* protected by the *Noerr-Pennington* doctrine." 827 F.2d at 460. In so holding, the Ninth Circuit was persuaded by the decisions of this Court protecting the right to petition those "who are not governmental actors but who are nevertheless involved in the political process." 827 F.2d at 462-63.[15] The Ninth Circuit recognized that in *Noerr* itself "an important component of the railroads' strategy was to exert pressure on governmental actors through the medium of public opinion." 827 F.2d at 463.[16]

Two district courts have also held that members of private industry are protected by *Noerr-Pennington* when they are participating in model code groups. *See Rush-Hampton Industries, Inc. v. Home Ventilating Institute,* 419

[15]In Brotherhood of R.R. Trainmen v. Virginia ex rel. Va. State Bar, 377 U.S. 1, 7 (1964), this Court determined that the right to petition the courts extended to a workers' cooperative plan to advise one another of legal rights. In NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907, 913-15 (1982), this Court held that activities designed to persuade private parties to join in a commercial boycott were protected where the boycott was part of an effort to procure governmental action.

[16]Additional bases supporting the Ninth Circuit's decision include that model code-making activity furthers political process interests and that the Sherman Act should not generally make parties liable for governmental acts. 827 F.2d at 463-64. Further, the Ninth Circuit recognized that first amendment associational rights are "plainly implicated" in model code groups. 827 F.2d at 463, 466 n.6.

F. Supp. 19 (M.D. Fla. 1976); *Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit Corp.,* 573 F. Supp. 833 (N.D. Ill. 1983). In each of those cases, contrary to the Second Circuit's speculation, the courts held that the most effective means by which an individual can "communicate its position to the powers that be," is to approach the model code group. *See, e.g., Wheeling-Pittsburgh,* 573 F. Supp. at 841.

In *Rush-Hampton,* a manufacturer financed a campaign of opposition to prevent its competitor from obtaining product approval from the regional building code organizations (several of *amici curiae* herein). The court extended *Noerr-Pennington* protection to the manufacturer, even though the court was convinced that the manufacturer was seeking to influence the regional building code organizations in a manner that would benefit it:

> This they had the right to do; the antitrust laws do not prevent presentation of arguments before legislative, judicial and administrative bodies even though such arguments and presentations, if successful, may adversely affect some business, industry or occupation.

419 F. Supp. at 25.[17]

[17]In *Rush-Hampton,* the court noted that the regional building model code groups performed functions which were both legislative in nature (drafting of model codes) and adjudicatory in nature (approving specific products). In trying to characterize the activities of these organizations, the court said the organizations were "quasi-administrative bodies." 419 F. Supp. at 24. In *Sessions Tank Liners,* the Ninth Circuit found it unnecessary to characterize model code groups: "The WFCA, whether designated as 'public,' 'private,' or even 'quasi-governmental,' plays an important and generally accepted role in the legislative process of the western states." 827 F.2d at 463.

Similarly, in *Wheeling-Pittsburgh,* one competitor allegedly conspired to prevent another from obtaining product approval from the National Fire Protection Association ("NFPA"), the model code group involved in this dispute, and United Laboratories ("UL"). 573 F. Supp. at 835. The court extended *Noerr-Pennington* protection because "[s]uch wholehearted reliance upon the NFPA and UL has resulted in a near complete delegation of governmental authority to these otherwise private entities," and because of such reliance, "[i]n order to influence effectively the governmental entities, [defendant] had no option but to lobby [them]." 573 F. Supp. at 838. *See also Federal Prescription Service, Inc. v. American Pharmaceutical Association,* 471 F. Supp. 126, 130 (D.D.C. 1979) (druggists who approached a "clearly non-governmental organization" allegedly to interfere with plaintiff's business of mailing prescription drugs were protected by *Noerr-Pennington* because the activities "were at least indirect attempts to influence governmental behavior"), *aff'd,* 663 F.2d 253, 262 n.6 (D.C. Cir. 1981) (alternative holding), *cert. denied,* 455 U.S. 928 (1982).

The Second Circuit's opinion below is out of step with *Noerr* and succeeding decisions of this Court, and is in direct conflict with *Sessions Tank Liners, Wheeling-Pittsburgh* and *Rush-Hampton.* The Second Circuit's opinion denies the realities of our political system and imposes on model code groups the impossible and counter-intuitive obligation of ferreting out self-interest before members of these groups may enjoy the protection of petitioning the government free from antitrust liability. The entire basis for the Second Circuit's opinion flows from its concern that model code groups "might operate contrary to the public interest" particularly "in view of their importance within the economy." *See* Petition at 15a, 14a. This reasoning misses the point.

Model code groups enjoy the respect of the governmental entities who rely upon them because these groups are able to mobilize governmental and private resources to develop codes. Silencing private participants in the groups by exposing them to antitrust liability for pointing out the faults of a competitor's product will diminish, if not extinguish, the value such groups have. This Court knows that it "is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors." *Noerr,* 365 U.S. at 139. This Court has said that "it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act." *Id.*

D. Abuses of the Model Code System Can Best Be Controlled Through the "Sham" Exception to the *Noerr-Pennington* Doctrine.

Rather than denying constitutional protection to methods of legislative influence that leave open the door the possibility of subterfuge, this Court mentioned in *Noerr,* and lower courts have applied, the "sham exception." 365 U.S. at 144. Briefly stated, the sham exception applies to conduct that is "actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *Id.*

> The term 'sham' can be a term without boundaries. Some courts and commentators use it as a catchall for any activity that is not afforded *Noerr* protection. But the basic concept, as employed by the Supreme Court, is that the defendant's activity was intended to injure the plaintiff directly rather than through a governmental decision.

P. Areeda & H. Hovenkamp, *Antitrust Law* 13-14 (1987 Supp.) (footnote omitted).

The Ninth Circuit in *Sessions Tank Liners* recognized the applicability of the sham exception to model code-making activity and remanded that case for determination of a "limited 'sham' exception claim." 827 F.2d at 468.[18] Indeed, the Ninth Circuit concluded in *Sessions Tank Liners* that while the Second Circuit may have

> simplified the law by reducing drastically the scope of the 'sham' exception . . . it complicated the law by requiring that the antitrust law develop the permissible practices of model code associations, their members, and participating non-members. It is unlikely that this exchange will result in a net simplification.

822 F.2d 465-66. In other words, model code groups will be faced with endless litigation defining "permissible practices," rather than the control of abuses through application of the sham exception. Implicit in the Ninth Circuit's characterization of the effect of the Second Circuit opinion is the conclusion that the proper and beneficial activities of model code groups will be greatly

[18]The Ninth Circuit indicated that alleged improper conduct may be subject to the sham exception if it amounts to an "abuse of process" which "capture[s]" the decision-making process of the code group. 827 F.2d at 466. Ultimately, the Ninth Circuit rejected all of Joor's claims of "sham" activity in the model code-making process, including alleged misrepresentations of fact to the subcommittee, because all were in the "political arena," as were the distortions of fact in the publicity campaign in *Noerr*. 827 F.2d at 467-69. The case was remanded so that plaintiff could pursue a limited claim under the sham exception, under which plaintiff alleged that, outside the WFCA code-making activities, Joor made misrepresentations to persuade public officials acting in their administrative capacity to deny certain permits.

reduced due to the fear and uncertainty created by that opinion over what may constitute improper conduct.

Excepting "inappropriate" or "improper" lobbying activity from *Noerr-Pennington* protection by invoking the sham exception is an effective way of regulating subterfuge of the political process. The sham exception precludes the possibility that *any* activity, whether it is model code-making or otherwise, may be totally exempt from antitrust scrutiny.

CONCLUSION

For the reasons stated above, *amici curiae* respectfully request this Court to reverse the decision of the Second Circuit.

November 19, 1987.

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Supreme Court, U.S.
FILED
NOV 19
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-157

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALLIED TUBE & CONDUIT CORPORATION,

Petitioner,

vs.

INDIAN HEAD, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE STATE OF ILLINOIS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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Printed by Authority of the State of Illinois (P.O. 33885—150—11-19-87)

QUESTION PRESENTED

Whether petitioner's lobbying a private model code organization, whose code is adopted by numerous state and local legislatures, can be held an actionable restraint of trade under the Sherman Act, consistently with *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and subsequent decisions further clarifying its doctrine.

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BRIEF OF THE STATE OF ILLINOIS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

IDENTITY AND INTEREST OF THE AMICUS

The State of Illinois submits this brief, as *amicus curiae*, in support of Allied Tube & Conduit Corporation's ("Allied") contention that the *Noerr-Pennington* doctrine precludes antitrust liability for Allied's lobbying activities before the National Fire Protection Association ("NFPA").

The Attorney General of Illinois is the chief law enforcement officer of the state and is charged with the duty

of enforcing the state's antitrust laws, as well as the federal antitrust laws. Illinois has a substantial interest in the correct interpretation by the lower federal courts of this Court's antitrust doctrine.

The Second Circuit's opinion will adversely impact upon the method by which states such as Illinois promulgate legislation in the areas of product safety and building construction. The opinion will jeopardize the crucial, free flow of scientific and technical information into the model code making process. It will deprive the code process of significant data currently furnished by commercially motivated private parties and place a substantial burden upon state and local legislatures to provide the financial means and technical expertise necessary to develop safety codes on their own; a burden they may be incapable of meeting.

SUMMARY OF ARGUMENT

Illinois and many other states depend upon model codes such as the National Electrical Code ("NEC") at issue, in exercising their regulatory and police powers in the protection of the health, safety and welfare of their citizens. The Second Circuit decision jeopardizes the system of governmental reliance on model codes, by denying those concerned parties with the greatest opportunity and motivation for valuable input, and which historically have raised significant public safety issues before the code-making bodies, protection from treble damage liability under the Sherman Act. Substantial exposure to such liability will cause a withdrawal, in whole or in part, of these resources from the process, limiting the debate and diminishing the

quality of the model codes adopted by state and local governments.

This Court in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965) and *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); commonly referred to as the *Noerr-Pennington* doctrine, held that the First Amendment rights to petition the government and to freely assemble, along with the absence of legislative intent in the Sherman Act to regulate political activity, dictated a finding that commercial competitors are free to jointly lobby the government for anticompetitive legislation without fear of antitrust liability.

The *Noerr* doctrine fully applies to the facts of this case. Allied's conduct in this case was in fact protected lobbying activity. The Second Circuit incorrectly decided the "directness" issue in failing to extend *Noerr* to lobbying before a private code making body which promulgates a code adopted by state governments. If the deceptive public relations campaign by the railroads in *Noerr*, entirely removed from the halls of Congress, is protected; surely the lobbying within the rules and regulations of the NFPA is protected.

Finally the "sham" exception to the *Noerr-Pennington* doctrine is not applicable. There was no denial of access to the process of the NFPA and no violation of the NFPA rules or regulations. Allied genuinely sought to petition the NFPA and consequently influence the state and local legislatures as an end or goal in and of itself, not as a facilitating device for a larger, separate scheme.

ARGUMENT

I.

ILLINOIS AND OTHER STATES SUBSTANTIALLY RELY ON MODEL CODES SUCH AS THE NEC

In technical and complex areas, as for example, safety codes and building regulations, state and local governments rely heavily upon a variety of model codes and other standards developed by voluntary organizations like the NFPA. *See* Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 Tex. L. Rev. 1329 (1978).

Illinois requires compliance with the NEC in all cities, towns and communities except those which by ordinance have adopted comparable provisions. See, 41 Ill. Admin. Code, Part 100, Secs. 100.10, 100.210. Illinois has specifically delegated the power to establish building codes to local governmental units. See, Ill. Rev. Stat., ch. 24, par. 11-30-4 and ch. 34, par. 422. It is estimated that over fifty percent of all Illinois municipalities have adopted the NEC.

Forty-four other states, including the District of Columbia, rely on the NEC in promulgating their electrical codes. Aff. of John Lison, May 16, 1985, Joint Appendix, 137, 145 as submitted in the case below. Twenty-five states adopt the NEC in its entirety by reference. *Id. See, e.g.*, 1981 N.Y. Laws Chap. 707; Md. Ann. Code art. 38a, Sec. 60; Colo. Rev. Stat. Sec. 12-23-104(a). Another nineteen adopt it with amendments, usually modest ones. *Id. See, e.g.*, Cal. Admin. Code Tit. 24, R.3; 527 Code of Mass. Regs. 12.00; N.J. Admin. Code, Tit. 5, Sec. 23; Wash. Admin. Code R. 296-46, R. 296-401. *See also* 29 C.F.R. Sec.

1910.66(c)(22)(i) (1986); 33 C.F.R. Sec. 183.435(a)(1) (1986) (federal regulations incorporating model codes by reference).

The development and promulgation of such complex codes requires public hearings, which usually involve technical, scientific data and issues. Hearings are frequently time consuming, particularly when controversial matters may result in judicial challenges to adopted regulations. Furthermore, airing of the technical issues requires expert staff to conduct the hearings, analyze the evidence, weigh the sometimes conflicting data, prepare the appropriate code language and disseminate adequate information to those affected by the regulations in order to secure compliance.

As a practical matter most state and local governments lack the necessary resources to conduct their own investigations. For that reason and because the NFPA and other groups do a competent job in their own right, state legislatures depend on the NFPA and like code-making associations to become, in effect, their committees and scientific laboratories. *See* Hamilton, *supra*, at 1377-78.

These voluntary organizations perform an invaluable public service and save state and local governments precious legislative resources in developing model codes for government consideration. *See* House Select Comm. on Small Business, *The Effect Upon Small Business of Voluntary Industrial Standards*, H.R. Rep. No. 1981, 90th Cong. 2d Sess. 3, 75 (1968).

II.

THE SECOND CIRCUIT'S DECISION WILL CHILL THE DEBATE REQUIRED FOR AN EFFECTIVE MODEL CODE PROCESS

State and local governments are best served by code-making organizations, such as the NFPA, having access to a free and vigorous flow of information and conducting robust and aggressive debate in creating the model codes. The full exchange of ideas—even "wrong" ones—is the crucible which shapes the final legislative product as it emerges from the mode code-making group's processes. Often, a party in the best position to raise concerns about the safety of a product is a competitor. *See, e.g., Noerr*, 365 U.S. at 136-137. Challenges, such as those made by Allied against respondent's PVC conduit on safety grounds, are precisely the sort of catalyst for investigation upon which the code-making process, and in turn the states, depend.

The imposition of antitrust liability in the circumstances of this case will inhibit free and open debate within model code organizations by those parties most capable and motivated to bring all the facts to the fore. Allied raised the issue of the safety of PVC conduit before the NFPA. While clearly Allied was motivated in part by commercial interest, the jury found as a matter of fact that Allied was also motivated by a genuine concern for safety. Furthermore, the objective validity of the safety issue raised by Allied was conceded at the trial by respondent. If Allied's conduct is not protected, few will ever be safe. Parties simply will not risk antitrust litigation to oppose a competitor's product, even with strong arguments based upon bona fide, scientific evidence that a particular product is unsafe or otherwise hazardous.

The decision below thus goes to the very heart of model code-making and threatens to destroy the model code process. It will become a sham, with critics of a product afraid to speak up for fear of exposure to antitrust claims. Nor is it an answer that participants may move to the legislatures directly with their challenges. The legislatures are ill-equipped to assume the task of initiating and developing complex codes from scratch in technical areas without the assistance of model codes. Taking over these functions would require staff increases at a time when most budgets are under considerable pressure.

In addition to the practical difficulty of state governments conducting hearings or revising technical codes, the Second Circuit's opinion may bring other more far-reaching problems. As code-making breaks down, the relative uniformity of product safety legislation in the building area will tend to diminish. The result is likely to be unseemly and dangerous competition for building activity based upon how lax a code a local area is willing to accept in order to induce the work.

On the other hand, the additional burden of having to develop complex legislation without the benefit of prior code-making will tend to cause local governmental units to be more reticent about changing and updating codes to accommodate new products or necessary changes. Paradoxically, a Court of Appeals decision that ostensibly is intended to enhance competition may well do the exact opposite, in the long run perpetuating and entrenching existing products.

III.

THE SECOND CIRCUIT MISINTERPRETED THE PROPER BREADTH OF THE *NOERR-PENNINGTON* DOCTRINE

In *Noerr* and its progeny, this Court clearly held that the First Amendment rights of association and petition coupled with an absence of legislative intent in the Sherman Act to regulate essentially political activity, mandated the freedom of commercial competitors to jointly lobby the government for even anticompetitive legislation. See, *Noerr*, *Pennington* and *California Motor Transport Co.*, *supra*.

The central issue in this litigation is whether *Noerr* protection extends to lobbying activities before private model code-making organizations, whose codes such as the NEC are then adopted in whole or substantial part by state and local legislatures. The four federal courts having considered this issue, other than the Second Circuit, have all extended *Noerr* to shield such lobbying activities. See, *Sessions Tank Lines, Inc. v. Joor Manufacturing, Inc.*, 827 F.2d 458 (9th Cir. 1987), *Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit Corp.*, 573 F. Supp. 833 (N.D. Ill. 1983), *Rush-Hampton Industries v. Home Ventilating Institute*, 419 F. Supp. 19 (M.D. Fla. 1976), and *Indian Head, Inc. v. Allied Tube & Conduit Corp.*, No. 81 Civ. 6250 (S.D.N.Y. June 27, 1986) (Dist. Ct. opinion below).

In *Sessions Tank Lines, Inc. v. Joor Manufacturing, Inc.*, *supra*, a case remarkably similar to this one, a company manufacturing fuel tank liners sued a company making fuel tanks, arguing that defendant Joor Manufacturing had undertaken a false information campaign to convince model code-making bodies to disallow tank liners.

The association in this case was the Western Fire Chiefs Association, WFCA, which passes a uniform fire code, just as the NFPA passes the NEC. Also at issue was the defendant's influence in persuading Underwriters Laboratories ("U.L."), another model code organization, not to certify the safety of tank liners.

The Ninth Circuit held:

> In the case before us, however, the defendant's efforts were directed at a private association serving as a conduit to local legislatures and various governmental agents. . .
>
> We hold that *Noerr-Pennington* applies. It immunizes proper lobbying—either singly or in combination with others—of a private association engaged in promulgating an important model code to influence legislative and executive decisions.
>
> Our holding rests on the various constitutional, policy and statutory considerations that underlie the *Noerr-Pennington* doctrine. Each of these considerations points clearly to the conclusion that *Noerr-Pennington* applies here.

at 827 F.2d 462.

Similarly, in *Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit Corp.*, 573 F. Supp. 833 (N.D. Ill. 1983), Allied, the petitioner in this case, sued Wheeling-Pittsburgh over Wheeling-Pittsburgh's attempt to lobby the NFPA to disapprove in the NEC a new type of conduit produced by Allied. The Court correctly recognized two key points. First, it noted the delegation of authority from state governments to model code groups:

> Such wholehearted reliance upon the NFPA and UL by these governmental entities has resulted in a near complete delegation of governmental authority to these otherwise private entities. While the govern-

> mental bodies of course have retained the power to modify or reject the NFPA and UL recommendations, in practice they have relied completely on them.

Id. at 838.

Second, the Court recognized the consequent difficulty of petitioning state government directly:

> as a practical matter it would be virtually impossible for WP to lobby the individual municipalities and states regarding the adoption of particular specifications or requirements for IMC. These governmental bodies have placed total trust and reliance on NFPA and UL. In order to influence effectively the governmental entities, WP had no option but to lobby NFPA and UL.

Id. at 838. *See also Indian Head, Inc. v. Allied Tube & Conduit Corp.*, No. 81 Civ. 6250 (S.D.N.Y. June 27, 1986) (Dist. Ct. Opinion below); *Rush Hampton Indus. v. Home Ventilating Inst.*, 419 F. Supp. 19 (M.D. Fla. 1976).

The State of Illinois urges the Court to accept the teaching of these four opinions not merely on a "strength in numbers" basis; but upon the logic of so extending the doctrine as already accepted by this Court in *Noerr* itself. The conduct involved in the instant case is more directly connected to the legislative chambers than that involved in *Noerr*. In *Noerr*, this Court placed out of Sherman Act reach, a joint public relations campaign by competitors involving the use of the so-called third party technique, whereby propoganda actually circulated by a party in interest is given the appearance of being the spontaneously expressed views of impartial citizens and civic groups. While the ultimate goal may have been to lobby the government the means were more indirect then "packing" the NFPA vote.

Similarly, the identity of the lobbyist and propriety of the methods employed cannot be the crucial factors in deciding the *Noerr* question. It is well established that neither the commercial motivation, no matter how anticompetitive, nor the methods employed, no matter how distasteful or even unethical (including outright misrepresentation) determine the issue. See, *Noerr*, supra; P. Areeda & D. Turner, *Antitrust Law*, Sec. 204.1c, at 45-46 (Supp. 1986); and *Sessions Tank Liners, Inc.*, supra, at 827 F.2d 467-468 (cases cited therein).

Clearly, Allied's conduct is protected from antitrust exposure under the *Noerr-Pennington* doctrine.

IV.

NOERR-PENNINGTON'S "SHAM" EXCEPTION DOES NOT APPLY

The jury finding that Allied "subverted" the NFPA code-making process through its "packing" the vote, heavily influenced the Second Circuit's denial of *Noerr* protection. While it did not then have to reach the sham exception issue, undoubtedly respondent will raise this issue as it did in the courts below.

The sham exception will virtually never apply in legislative petitioning cases. The State of Illinois is not aware of a single legislative petitioning case wherein the challenged conduct has been found to be a sham. See, Handler & DeSovo, *The Noerr Doctrine and Its Sham Exception*, 6 Cardozo L. Rev. 1 (1984).

Allied violated no rule or regulation of the NFPA, no misrepresentations appear of record, no attempt was made at denying respondent access to the code-making process, and the purpose of excluding PVC from the NEC was the ultimate goal as opposed to a subterfuge or facilitating

device for a larger scheme. The record establishes that Allied had a genuine belief that the PVC product was unsafe and it acted, at least, in part on that belief. Neither court below found Allied's conduct to be a sham. The "subversion" finding does not provide a basis for application of the sham exception any more than did the railroads' unethical behavior, embracing "vicious, corrupt, and fraudulent" conduct in *Noerr*. 365 U.S. at 129. See also *Sessions, supra*. 827 F.2d at 468.

CONCLUSION

For all of the reasons stated herein, the State of Illinois respectfully requests that the decision of the Second Circuit Court of Appeals be reversed.

Respectfully submitted,

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November 19, 1987

No. 87-157

(10)

FILED
DEC 31 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

ALLIED TUBE & CONDUIT CORPORATION, PETITIONER

v.

INDIAN HEAD, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

The United States and the Federal Trade Commission will address the following question:

Whether petitioner's actions affecting the contents of the 1981 National Electrical Code adopted by the National Fire Protection Association, a private, voluntary membership organization, are shielded from liability under the Sherman Act, 15 U.S.C. (& Supp. IV) 1 *et seq.*, under the doctrine of *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

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ALLIED TUBE & CONDUIT CORPORATION, PETITIONER

v.

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BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES AND THE FEDERAL TRADE COMMISSION

The Department of Justice and the Federal Trade Commission have the primary responsibility for enforcing the antitrust laws. The courts have traditionally applied the antitrust laws to private standard-making organizations and their members,[1] and the Department and the Commission have engaged in enforcement actions against such organizations.[2] The Department and the Commission

[1] See, *e.g.*, *American Society of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 456 U.S. 556 (1982), aff'g 635 F.2d 118 (2d Cir. 1980); *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961).

[2] See, *e.g.*, *American Society of Sanitary Engineering*, 106 F.T.C. 324 (1985) (consent decree); *United States* v. *American Society of Mechanical Engineers, Inc.*, 1972 Trade Cas. (CCH) ¶¶ 74,028, 74,029 (S.D.N.Y. 1972) (consent decree).

have an interest in assuring that the *Noerr*[3] doctrine is not interpreted to exempt from antitrust scrutiny anti-competitive activities conducted by members of private standard-making organizations.

STATEMENT

1. Carlon, a division of respondent Indian Head, Inc., manufactures and sells electrical non-metallic tubing (ENMT), a flexible plastic electrical conduit made from polyvinyl chloride, which is used in building construction to carry insulated electric wires. Respondent claims that ENMT has significant competitive advantages over steel conduit that performs the same function, including pliability, lower installed cost, and lower susceptibility to short-circuiting; in 1980, there was also a scientific basis for concern about the safety of ENMT, particularly in fires in high-rise buildings. The dispute in this case stems from respondent's efforts to have the National Fire Protection Association (NFPA) list ENMT as a permissible type of electrical conduit in the 1981 edition of the National Electrical Code (NEC). Pet. App. 3a-4a.

The NFPA is a private, voluntary organization with more than 31,500 individual and group members representing industry, labor, academic organizations, the insurance industry, and other interests. The NEC, which is revised every three years,[4] establishes product and per-

[3] See *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

[4] The revision of the NEC is a multi-step process. A proposed amendment is first submitted to a code-making panel composed of professionals with relevant technical expertise. No more than one-third of the membership of such a panel may represent a single interest. If approved by the panel, a proposal is transmitted to the full NFPA membership, where its fate is decided by majority vote. Members may appeal an adverse vote to the NFPA's Standards Council and ultimately to its Board of Directors. Finally, under a procedure

formance requirements for the design and installation of electrical wiring systems, including electrical conduit. The code is influential world-wide, and is adopted by a substantial number of state and local governments, either without change or with modest revisions. Pet. App. 4a-5a & n.1. Because many state and local governmental authorities rely on the NEC, a firm that wishes to market a new electrical product in a category covered by the NEC, such as electrical conduit, must as a practical matter obtain approval for that product in the NEC (C.A. App. 1557). Private certification laboratories, such as Underwriters Laboratories, also normally will not list and label an electrical product that is not approved by the NEC (C.A. App. 1558; Tr. 145-146, 300).

In 1978, respondent asked the NFPA to list ENMT as a permissible type of electrical conduit in the 1981 edition of the NEC (Pet. App. 6a; C.A. App. 1555). In December 1979, the NFPA code-making panel responsible for reviewing ENMT, after initially rejecting the product, approved it for inclusion in the 1981 NEC (Pet. App. 6a; C.A. App. 1561). This decision was then subject to approval by a simple majority of the members attending the NFPA's 1980 annual meeting (Pet. App. 5a).

Petitioner is a major domestic producer of steel conduit (Pet. App. 3a-4a). Recognizing that the NFPA's approval of respondent's product would be likely to harm sales of steel conduit, petitioner met with members of the steel industry and others to consolidate opposition to ENMT at the 1980 NFPA meeting. Petitioner and its confederates

known as a tentative interim amendment, a code-making panel, the Standards Council, and the Board of Directors may temporarily include a proposal in the Code on an interim basis until the next code cycle. Pet. App. 5a-6a. The NFPA publicly describes itself as using "widely accepted consensus procedures representing a balance of interests and opportunity for review and comment at all levels" and "one of the most democratic and procedurally fair systems of code development in existence" (C.A. App. 1988, 1991).

agreed to bring as many votes as possible to the upcoming NFPA meeting; petitioner itself pledged to bring at least 100 votes. *Id.* at 6a.[5] Petitioner eventually paid the NFPA membership dues and expenses for 155 persons, including its own executives, employees and sales agents, to join the organization and to attend the meeting, at a cost of more than $100,000 (*id.* at 7a; C.A. App. 1566).

At the NFPA meeting, petitioner instructed its personnel where to sit, and group leaders instructed the steel-group voters how to vote, using walkie talkies and hand signals to facilitate communication (Pet. App. 7a-8a; C.A. App. 1566-1567). Few of petitioner's voters understood the merits of the debate over respondent's product, and none spoke in oppositon to approval of ENMT during the meeting (Pet. App. 8a). At the conclusion, the NFPA members decided by a vote of 394-390 to return the ENMT proposal to committee (*ibid.*). If petitioner and its allies had not "packed" the meeting, ENMT would have been approved by the NFPA for inclusion in the 1981 NEC (see J.A. 24). Respondent appealed the membership's vote to the NFPA's Board of Directors, but the Board denied the appeal on the ground that the NFPA rules had been circumvented but not violated (Pet. App. 8a). Respondent thereafter applied for a temporary interim amendment to include ENMT in the 1981 NEC, but a subcommittee of the Board eventually denied respondent's request on the ground that the proposal did not contain appropriate emergency subject matter (*ibid.*; C.A. App. 1570).[6]

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[5] Prior to submission of the liability issue to the jury, petitioner conceded that it had agreed with other steel companies to oppose respondent's product (Pet. App. 9a; Tr. 2160).

[6] Subsequently, the NFPA amended its rules to prevent similar attempts to circumvent its rules (Pet. App. 21a; Tr. 307-308). In 1984, ENMT was approved for inclusion in the code, for use in buildings with three or fewer stories (Pet. App. 9a n.3; Tr. 258).

2. In October 1981, respondent brought suit in the United States District Court for the Southern District of New York, alleging that petitioner and others had unreasonably restrained trade in the manufacture and sale of tubing for use in above-ground electrical wiring in buildings, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1 (J.A. 4-7, 14).[7] A bifurcated trial was held. After the presentation of evidence on liability, the jury was instructed to apply the "rule of reason" and to determine whether petitioner and others had unreasonably restrained trade (Tr. 2160, 2165).[8] The jury returned a verdict in respondent's favor (J.A. 23-25). In answers to interrogatories, the jury also found that petitioner had not violated any NFPA rules or procedures but had subverted the NFPA's consensus standard-making process. In addition, the jury found that petitioner's actions adversely affected competition and constituted an unreasonable restraint of trade (J.A. 24-25).

The court then instructed the jury on damages. The court told the jury that it could not award respondent damages for petitioner's lobbying efforts before legislative and political bodies with respect to the safety of ENMT, but could award respondent damages for the losses it suffered through the exclusion of its product from the 1981 NEC (Pet. App. 9a n.3; Tr. 3266). The jury returned a verdict of $3.8 million in lost profits.

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[7] Respondent named both petitioner and the NFPA as defendants but dismissed its action against the NFPA before trial.

[8] The district court instructed the jury that it could find that standard-making has procompetitive aspects; that petitioner's conduct during the vote on ENMT had nonetheless been anticompetitive; and that if the anticompetitive effects of petitioner's actions outweighed any procompetitive benefits, respondent was entitled to prevail (Tr. 2164-2169).

3. The district court subsequently granted a judgment n.o.v. for petitioner, concluding (Pet. App. 23a-32a) that petitioner's actions were shielded from antitrust liability by the *Noerr-Pennington* doctrine. See *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of America* v. *Pennington,* 381 U.S. 657 (1965). The court characterized the NFPA as "akin to a legislature" (Pet. App. 28a), and also reasoned that, because the NFPA's standards are routinely adopted by state legislatures, petitioner's lobbying efforts before the NFPA constituted "a genuine attempt to influence legislative action" (*id.* at 26a; see also *id.* at 30a). The court rejected respondent's argument that petitioner's actions before the NFPA were, in fact, a sham not entitled to immunity under *Noerr,* on the ground that petitioner had a legitimate concern about the safety of respondent's product (*id.* at 28a). The court concluded that petitioner could not be held liable for the injury to respondent that stemmed from the actions of private parties, because, in the court's view, respondent had not relied on that theory at trial (*id.* at 28a-29a, 31a).

4. The court of appeals reversed (Pet. App. 1a-22a). The court stated that respondent did not seek damages for any injury arising from the adoption of the NEC by state or local governments and that respondent was awarded damages only on the theory "that the stigma of not obtaining NEC approval of its product and [petitioner's] 'marketing' of that stigma caused independent marketplace harm to [respondent] in those jurisdictions permitting use of [polyvinyl chloride] conduit" (*id.* at 9a n.3). Viewing the case in that light, the court of appeals ruled that petitioner was not protected by *Noerr.*

The court declined to treat private standard-making bodies like the NFPA as if they were governmental bodies (Pet. App. 12a-17a). The court said, "*Noerr*'s holding depended on the unique nature of petitions directed to the

government in our political system; [this Court] focused upon the 'right of the people to inform their representatives in government of their desires with respect to the passage and enforcement of laws' " (*id.* at 13a (quoting 365 U.S. at 139)). The court stressed the need of governmental bodies for a free flow of information and the safeguards that protect the public interest in governmental action. By contrast, the court said, the NFPA, like other private standard-making organizations, is not accountable to the electorate but may be presumed to be acting primarily on its own behalf (Pet. App. 13a-15a). The court added that extending *Noerr* to so called "quasi-legislative" bodies, like the NFPA, would present serious practical problems about how to limit the scope of immunity (*id.* at 15a). The court concluded that the fact that governments routinely adopt provisions modeled on the NEC does not transform the NFPA into "a governmental organ" (*id.* at 16a-17a).

The court also rejected petitioner's argument that its efforts to lobby the NFPA were entitled to immunity under *Noerr* as indirect attempts to influence state and local governments (Pet. App. 17a-19a). Relying on the principle that exemptions from the antitrust laws are to be narrowly construed, the court explained that, while submission of a recommendation to the government is protected by *Noerr*, antecedent anticompetitive conduct outside the political arena that injures a rival is not entitled to immunity (*id.* at 17a-18a). The reason, it said, is that the policies underlying the *Noerr* doctrine do not justify immunizing anticompetitive conduct undertaken to persuade a private organization, because a party can always lobby state and local governments directly (*id.* at 18a). Finally, the court rejected petitioner's claim that any attempt to lobby state and local governments not to approve ENMT would have been futile once the NFPA endorsed that product. The

court pointed out that governments frequently modify the NEC before adopting it (*id.* at 18-19a).[9]

SUMMARY OF ARGUMENT

The court of appeals ruled correctly that petitioner's actions affecting the contents of the 1981 National Electrical Code are not protected by the *Noerr* doctrine. Neither the fact that the National Fire Protection Association follows forms and procedures that in some ways resemble those of a legislative body, nor the fact that the NEC has a foreseeable major influence on the contents of various state and municipal codes, turns petitioner's actions into "mere attempts to influence the passage or enforcement of laws." *Noerr*, 365 U.S. at 135.

The National Fire Protection Association is not a legislative body or part of government at any level, and attempts to influence its decisions are not protected by *Noerr* merely because the activities of NFPA members in reaching those decisions may bear some resemblance to political activities. The NFPA is a private, voluntary membership organization that "may be presumed to be acting primarily on * * * its own behalf," rather than in

[9] The court also rejected petitioner's claim that its conduct did not constitute an unreasonable restraint of trade as a matter of law (Pet. App. 19a-22a). Petitioner argued that an industry participant in a standard-setting organization should not be held liable under the antitrust laws when it is motivated (at least in part) by legitimate, scientifically justified safety concerns and when the organization's decisionmaking procedures are procedurally fair. The court rejected that argument on the ground that petitioner had subverted the integrity of the NFPA's procedures in order to obtain an anticompetitive result, and the court declined "to permit a defendant to use its literal compliance with a standard-setting organization's rules as a shield to protect such conduct fron antitrust liability" (*id.* at 21a). The court also ruled that petitioner's restraint of trade could not be justified on safety grounds (*id.* at 22a, citing *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 397-398 (1927)).

the public interest. *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 45 (1985). Its voting members are not selected by, nor are they answerable to, the general public. And the constitutional right that underlay the decision in *Noerr*—the "right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws" (365 U.S. at 139)—has no direct application to attempts to influence persons who are not "representatives in government."

Nor does the fact that the NEC has a foreseeable major influence on the contents of many state and municipal codes immunize petitioner's activities. To be sure, the *Noerr* doctrine protects not only direct communications to "representatives in government" but also some indirect communications and some activities preliminary to direct or indirect communications with government representatives. But the activities alleged in this case do not fit into any of these protected categories.

First, the actions at issue in this case cannot be viewed as indirect communications to "representatives in government," or as preliminary steps in that process, because the NFPA is not permitted by the Internal Revenue Code to—and does not—attempt to influence state or local code-making. Its pertinent activity is to promulgate standards for various industries, which it then offers to the public. The mere fact that one of several consequences of the promulgation of standards by the NFPA is that some governmental bodies will enact those standards into positive law does not mean that any person's right to petition his government is traversed by holding NFPA members accountable under the antitrust laws for their conduct within the organization.

Second, in any event, the *Noerr* doctrine does not shield activities that are illegal (whether because they create unreasonable restraints of trade or otherwise) for reasons that are wholly independent of any restraint of trade

resulting from the governmental activity that the defendant wishes to bring about. An otherwise unlawful group boycott, for example, does not become protected activity merely because one of its objectives is to attract the attention of the legislature. The decision below was based on the conclusion that petitioner's actions created a stigma that injured respondent at times and in places where its product did *not* violate local codes. If petitioner's conduct constituted an unreasonable restraint of trade independent of any governmental actions that may have resulted from that conduct, such a restraint does not become lawful merely because governmental actions are one of its consequences.[10]

ARGUMENT

THE *NOERR* DOCTRINE DOES NOT SHIELD PETITIONER'S CONDUCT FROM SCRUTINY UNDER THE ANTITRUST LAWS

A. The *Noerr* Doctrine Shields Activities That Constitute Petitioning The Government

The *Noerr* doctrine originated in this Court's decision in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). In that case, Pennsylvania truck operators and their trade association filed a Sherman Act complaint against 24 Eastern railroads, an association of the presidents of the railroads, and a public relations firm, alleging that the defendants had pursued a lobbying and public relations campaign that was designed to encourage the enactment and retention of laws and law enforcement practices that would be destructive of the trucking industry. 365 U.S. at 129-130, 138-139, 142-143. The Court ruled that the defendants could not be held liable under the Sherman Act for their activities. *Id.* at 135-145.

[10] We take no position on the second question presented by the petition, *i.e.*, the legality of petitioner's conduct under the Sherman Act assuming the inapplicability of *Noerr*.

Beginning with the premise, established in *United States* v. *Rock Royal Co-op.*, 307 U.S. 533 (1939), and *Parker* v. *Brown*, 317 U.S. 341 (1943), that a Sherman Act violation cannot be based on a restraint of trade that is the result of valid governmental action, the Court concluded that the Sherman Act does not prohibit private parties from banding together to lobby the legislature to create a restraint of trade in their favor. As the Court put it, there is an "essential dissimilarity" between an agreement to seek favorable government action and the type of agreements traditionally condemned by the Sherman Act. *Noerr*, 365 U.S. at 136-137. The Court also noted that construing the Sherman Act to reach efforts to petition the government would hamper the ability of government to act in the public good, because representative government depends on the ability of citizens freely to inform their representatives of their wishes. *Id.* at 137. That result, moreover, would impute to the Sherman Act "a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatsoever in the legislative history of that Act." *Ibid.* (footnote omitted). Finally, the Court found that applying the Sherman Act to the political conduct at issue in that case would infringe on the right to petition government protected by the First Amendment. *Id.* at 137-138. Accordingly, the Court held that the Sherman Act did not reach the activities of the railroads "at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws." *Id.* at 138. See also *United Mine Workers of America* v. *Pennington*, 381 U.S. 657, 669, 671 (1965); *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510-511 (1972) (stating that the *Noerr* doctrine rests on the First Amendment).[11]

[11] *Noerr* left open the question whether an ostensibly political campaign that is a sham to disguise an attempt to disrupt the business operations of a competitor is subject to the Sherman Act. *Noerr*, 365

Relying on *Noerr*, petitioner argues that it cannot be held liable for lobbying the NFPA to exclude respondent's product from the 1981 NEC, because its conduct was tantamount to an attempt to petition governmental bodies to reject respondent's product. That contention lacks merit for two reasons. First, the NFPA is a private organization, not the government, and persuading a private organization to take steps that injure a rival is not equivalent to petitioning the government to take governmental action that injures a rival. Second, petitioner's actions before the NFPA are not protected by *Noerr* as an indirect way of petitioning state and local governmental bodies. The NFPA may not and does not seek to influence state or local code-making, and in any event *Noerr* does not shield activities that are unlawful for reasons wholly independent of any restraint of trade resulting from governmental activity.

B. The NFPA Is Not A Governmental Body, And Petitioning The NFPA Does Not Amount To Petitioning The Government

The NFPA is a private, voluntary, membership organization, whose leadership and membership are neither elected by nor answerable to the body politic, and petitioner stipulated that the NFPA is not a governmental entity. Activities seeking to influence NFPA may bear some resemblance to political activities, but petitioner's efforts to cause the NFPA to exclude respondent's product from the 1981 National Electrical Code do not constitute efforts to lobby a governmental body under *Noerr*.[12]

U.S. at 144. The Court expressly endorsed that exception to *Noerr* in *California Motor Transport*, 404 U.S. at 515-516.

[12] The court of appeals in *Sessions Tank Liners, Inc.* v. *Joor Mfg. Co.*, 827 F.2d 458 (9th Cir. 1987), petitions for cert. pending, Nos. 87-687 and 87-916, on which petitioner relies heavily, also suggested that a standard-making organization may be quasi-governmental, and treated the private organization as the relevant legislative body in deciding whether the sham exception to *Noerr* was applicable. *Id.* at 463, 464-469.

Noerr shields political activity directed towards government. The Court's opinion in *Noerr* described conduct that involves "an attempt to persuade the legislature or the executive to take particular action" (365 U.S. at 136) and steps undertaken "in the political arena" (*id.* at 141). *Noerr* spoke of "an agreement jointly to seek legislation or law enforcement" (*id.* at 136), "associations [formed] for the purpose of influencing the passage or enforcement of laws" (*id.* at 137), the public's right "freely [to] inform the government of [its] wishes" (*ibid.*), "activities [that] comprised mere solicitation of governmental action with respect to the passage and enforcement of laws" (*id.* at 138), "seek[ing] action on laws" (*id.* at 139), and "depriv[ing] the government of a valuable source of information" (*ibid.*). Referring to the facts of the case, the Court also noted that the railroads' publicity campaign was "directed toward governmental action," was "designed to influence governmental action," was "a publicity campaign to influence governmental action" (*id.* at 140, 142-143), and was "a 'no-holds-barred fight' between two industries," which is "commonplace in the halls of legislative bodies" (*id.* at 144 (footnote omitted)). Actions taken to persuade a private organization not to approve a competitor's product do not fit any of these characterizations.

The *Noerr* decision was based on the notion that a governmental body may validly act in ways that restrain trade, and private persons may engage—and combine to engage—in activities seeking to persuade it to do so. 365 U.S. at 136. But this Court has long since made it clear that private entities are not governmental bodies for this purpose.[13] In *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), the Canadian govern-

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[13] Significantly, petitioner does not claim that the NFPA's standard-setting activities would constitute state action exempt from the antitrust laws. Nor would that claim have merit, since the NFPA is

ment had appointed a Union Carbide subsidiary as its wartime agent to purchase and allocate to Canadian industries the vanadium products they required. The plaintiff alleged that Union Carbide directed its subsidiary to exclude the plaintiff from the Canadian market as part of a conspiracy to monopolize the vanadium industry. Union Carbide argued that it was immune under *Noerr*, but this Court found that *Noerr* was "plainly inapposite" and that Union Carbide's conduct was "wholly dissimilar" to that of the railroads in *Noerr*. *Id.* at 707. *Noerr* was inapposite, because the purchasing agent in *Continental Ore* was not a public official and there was " 'no indication that the Controller or any other official within the structure of the Canadian Government approved or would have approved of ' " Union Carbide's practices. *Pennington*, 381 U.S. at 671 n.4 (citation omitted). The Court concluded that subjecting a party such as Union Carbide to liability "for eliminating a competitor from the Canadian market by exercise of the discretionary power conferred upon [its subsidiary] by the Canadian government would effectuate the purposes of the Sherman Act and would not remotely infringe upon any of the consitutionally protected freedoms spoken of in *Noerr*." *Continental Ore*, 370 U.S. at 707-708. See also *Feminist Women's Health Center, Inc.* v. *Mohammad*, 586 F.2d 530, 544-545 (5th Cir. 1978), cert. denied, 444 U.S. 924 (1979) (medical review organizations whose recommendations may be followed by a statutory board are not governmental bodies for purposes of *Noerr*).

The right to petition government is essential to a representative democracy because it allows citizens to

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a non-governmental entity, and its activities are not specifically authorized, nor subject to on-going supervision, by any government. See *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48, 57 (1985).

"communicate their will" to the legislature and government officials. 1 Annals of Cong. 738 (James Madison) (J. Gales ed. 1789). See also *McDonald* v. *Smith*, 472 U.S. 479, 482 (1985); *id.* at 486 (Brennan, J., concurring); *United States* v. *Cruikshank*, 92 U.S. 542, 552 (1875). That right is not involved in an attempt to influence a private standard-making organization. On the one hand, a private organization "may be presumed to be acting primarily on * * * its own behalf." *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 45 (1985). Members of standard-making organizations "may well view their position * * * at least in part, as an opportunity to benefit their employers," rather than the public. *American Society of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 456 U.S. 556, 571 (1982). And on the other hand, subjecting attempts to influence private standard-making bodies to antitrust scrutiny does not restrict the right of any person, including a member of such an organization, to "inform the government of [its] wishes" (*Noerr*, 365 U.S. at 137), or to enter into "an agreement jointly to seek legislation or law enforcement" or to "solicit[] * * * governmental action with respect to the passage and enforcement of laws" (*id.* at 136, 138). In particular, nothing in the decision below restricts the right of petitioner, alone or with other persons (including members of the NFPA), to urge any governmental body to adopt or enforce governmental policies hostile to the use of ENMT.

C. Petitioner's Efforts To Influence The NFPA Are Not Shielded By *Noerr* As An Indirect Means Of Petitioning Governmental Bodies

Petitioner contends (Br. 16-35) that even though the NFPA is not a governmental body, its conduct at the NFPA meeting constitutes a *Noerr*-protected indirect method of petitioning state and local legislatures. Petitioner maintains that it expected that excluding ENMT from the 1981 National Electrical Code would influence

state and local governments not to allow the use of that product. Petitioner therefore submits that its successful efforts to exclude ENMT from the 1981 NEC were a protected form of petitioning government, even though they were indirect both in their nature and their effect. That claim misconstrues the protection offered by the *Noerr* doctrine.

It is clear that the *Noerr*-protected right to petition government can take indirect forms. *Noerr* itself was explicit that the activities it protected include not only direct communications to legislators and other government officials but also various forms of indirect communication, as well as other preliminary, organizational, and preparatory steps.[14] In some cases, it may be difficult to draw the correct line between activity that is protected by *Noerr* and activity that is subject to scrutiny under the Sherman Act. This, however, is not a hard case, for two reasons.

1. The NFPA is not and cannot be the vehicle for petitioner or anyone else to petition state and local governments with respect to their building codes. The NFPA does not, and is not permitted to, attempt to influence legislation; it is a charitable organization, exempt from federal taxation under Section 501(c)(3) of the Internal Revenue Code, and is prohibited from attempting to influence legislation.[15] Accordingly, the NFPA's standard-

[14] In *Noerr*, the railroads' anti-trucking publicity campaign was directed at participants in the political process. 365 U.S. at 129-130, 140. While the publicity campaign did not involve direct solicitation of government action, it did take place "in the political arena" through efforts to convince the voters to put pressure on their elected representatives to restrain the truck operators and through publicity to sway government policy makers. *Id.* at 140-141.

[15] See IRS, *Pub. No. 78, Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code of 1954*, at 861 (1986). The NFPA cannot maintain its status as a charitable organization under Section 170(c) of the Internal Revenue Code if it is disqualified under Section 501(c)(3) because of its "attempt[s] to influence legislation." 26 U.S.C. 170(c)(2)(D), 501(c)(3). Under Section 501(c)(3), an organization may qualify as a "charitable organization" only if "no substantial part" of its activities consists of an attempt to influence the government to pass legislation. See also Treas. Reg. 1.501(c)(3)-1(c)(3)(ii).

making process is not a "petitioning" activity, and petitioner's activities within the NFPA cannot, as such, be justified as an effort to set a direction for the NFPA preparatory to a petitioning campaign.[16]

Petitioner did, of course, hope and expect that state and local legislatures would look to the 1981 NEC for guidance, but nothing in *Noerr* suggests that an activity undertaken with the mere hope or expectation that some governmental bodies will take notice is exempt from scrutiny under the antitrust laws. This Court described the activities protected in *Noerr* as "political activities" undertaken "in the political arena." *Noerr*, 365 U.S. at 140-141. What the Court sought to protect was the right of the "people * * * freely [to] inform the government of their wishes" (*id.* at 137). In this case, the direct purpose and effect of petitioner's efforts at the NFPA convention were to prevent the inclusion of ENMT in the NEC, a

[16] Compare, *e.g.*, *United Mine Workers of America* v. *Illinois State Bar Ass'n*, 389 U.S. 217 (1967) (union's hiring of lawyers to prepare its members' claims for presentation to the government is protected petitioning activity); *Brotherhood of Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964) (individuals may join to recommend competent lawyers to each other as preparation for petitioning the courts); *Federal Prescription Service, Inc.* v. *American Pharmaceutical Ass'n*, 471 F.Supp. 126, 129-130 (D.D.C. 1979), aff'd in part and rev'd in part, 663 F.2d 253 (D.C. Cir. 1981), cert. denied, 455 U.S. 928 (1982) (*Noerr* protects effort by one organization to solicit other organizations to rally in a joint campaign to induce government action; court distinguishes attempt to exclude competitor through adoption of code of ethics).

private industry code. Although state and municipal governments ultimately might decide to adopt the NEC, in whole or in part, that governmental decision cannot be the result of any lobbying campaign by the NFPA.

Petitioner has the right, singly or in combination with others, to urge state and municipal legislatures to prohibit or restrict the use of respondent's product, and the *Noerr* doctrine insulates that activity from liability under the Sherman Act. As stated above, Sherman Act scrutiny of petitioner's activities within the NFPA would not in any way restrict petitioner's right to engage in "petitioning" activity; it would merely prevent petitioner from providing momentum to that activity by the misuse of an inherently nonpolitical organization.

2. The essence of *Noerr* is that the Sherman Act does not prohibit private persons from combining to restrain trade by enlisting the instrumentalities of government to impose retraints—even if the restraints themselves might otherwise be judged unreasonable, and even if the private persons' conduct is of the ugly sort that sometimes occurs in the rough-and-tumble of the political process. The Sherman Act was not intended to trump the right of government to regulate economic behavior, or the right of the citizenry to ask it to do so, whether or not the requests are "reasonable." Moreover, the Court made it clear in *Noerr* that "efforts to influence the passage and enforcement of laws" (365 U.S. at 142) do not lose *Noerr* protection merely because a rival may have "sustained some direct injury as an incidental effect of the * * * campaign to influence governmental action" (*id.* at 143).

The *Noerr* doctrine does not, however, shield actions that are illegal (whether because they create unreasonable restraints of trade or otherwise) for reasons that are wholly independent of any restraint of trade *resulting from* the governmental activity that the defendant wishes to bring about. No one would suggest that kidnapping a

legislator—even as a symbolic gesture—is a permissible way of communicating with the legislature. Nor should anyone suggest that price fixing, or a group boycott, is permissible even if its sole ultimate purpose is to attract the legislature's attention; the suggestion is particularly inapt if one of the objectives is to impose a direct restraint independent of any restraint resulting from governmental action.[17]

In the present case, the court of appeals understood (Pet. App. 9a n.3) that respondent prevailed because petitioner engaged in conduct that constituted unlawful restraint of trade without regard to the action of any governmental body. The court reasoned that such conduct did not become lawful under *Noerr* merely because one foreseeable consequence of the 1981 NEC was that various governmental bodies would adopt legislation that would impose restraints of their own. That reasoning, we submit, was correct.

The restraint of trade that respondent alleged in this case was not the exclusion of respondent's product from local building codes but the actions of petitioner in excluding ENMT from the NEC.[18] Respondent contended, inter alia, that this action injured it in jurisdictions that permitted a product not listed in the NEC to be used. (For instance, private organizations such as Underwriters

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[17] We are not here invoking the so-called "sham' exception to the *Noerr* doctrine. See 365 U.S. at 144. We assume that petitioner's hope that legislation would be adopted was both genuine and one of the motivating forces. Our point is that activity that is unlawful on its own terms is not made lawful by the fact that one of its motives is a desire to influence the adoption of legislation.

[18] Petitioner therefore misses the point in arguing (Br. 39-41) that the state action doctrine protects it from liability for its actions during the 1980 NFPA meeting, on the ground that the doctrine "precludes Sherman Act recovery for trade restraints imposed by legislative enactments." Respondent was not awarded damages for that injury.

Laboratories rely on the NEC listing in evaluating and approving electrical products.) This injury appears to have been measured by the jury here: The district court instructed the jury that in determining damages it could consider the stigma of exclusion from the 1981 NEC and that it could not award damages premised on any lobbying activities on petitioner's part (see Tr. 3264-3267); the jury, so instructed, returned a $3.8 million damage award.[19]

Petitioner's claims (Br. 32-33) that it was pursuing a successful "grass roots" lobbying campaign, that it was "generat[ing] public pressure for or against legislation," and that its activities were analogous to trade association lobbying, simply ignore the fact that its conduct allegedly included an unlawful restraint of trade that was complete in itself without regard to any legislative response. *Noerr* protects the right to seek governmental restraints on competitors. It does not shield completed wrongs committed on the way to the legislature. Cf. *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 912-915 (1982) ("right of business entities to 'associate' to suppress competition may be curtailed").[20]

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[19] Petitioner ignores the effect of its actions on respondent in the private arena when it claims (Br. 21, 22, 40-41) that its actions before the NFPA "did not in themselves have any anticompetitive effect" and that the injury to respondent, "if any, was caused by the adoption of the NEC by the various state legislatures."

[20] In *Claiborne Hardware*, the Court noted that it did not need to decide "the extent to which a narrowly tailored statute designed to prohibit certain forms of anticompetitive conduct or certain types of secondary pressure may restrict protected First Amendment activity." 458 U.S. at 915 n.49. See also *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 697-698 & n.27 (1978) (First Amendment right of free speech and petition does not prevent enforcement of injunction prohibiting anticompetitive provision of an industry code); *California Motor Transport*, 404 U.S. at 513-515 (First Amendment right of free speech does not prohibit government regulation of anticompetitive agreements); *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 497-504 (1949) (same).

Petitioner claims (Br. 25) that if it was to squelch competition from ENMT it had to do so by excluding ENMT from the NEC because in many jurisdictions lobbying against the NEC is a fruitless endeavor. Even if that claim were true,[21] it would hardly justify affording petitioner immunity. The fact that an activity obtains legislative results does not prove that it is protected petitioning. In a variety of similar contexts, commercial schemes for dramatizing a cause and focusing governmental attention have been found to violate the antitrust laws when they restrain competition.[22] Petitioner's argument would immunize the adoption of private restraints, whether or not reasonable, whenever the private parties developing them hope and expect that at some future point their work product will be adopted by one or more governmental entities. The courts of appeals, however, have repeatedly rejected

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[21] It may well be exaggerated. The court of appeals pointed out that more than half of the states and cities polled by petitioner amended the NEC before adopting it or declined to adopt it at all (Pet. App. 18a-19a; *id.* at 4a-5a n.1). That evidence undercuts petitioner's claim that lobbying local governments is fruitless.

[22] See, *e.g.*, *Virginia Academy of Clinical Psychologists* v. *Blue Shield of Virginia*, 624 F.2d 476, 482 (4th Cir. 1980), cert. denied, 450 U.S. 916 (1981) (Blue Shield Plans' collaboration in defiance of state statute, which may have been designed to force the state to bring a lawsuit that would produce a judicial resolution of the plans' grievances, was not petitioning protected by *Noerr*); *Osborn* v. *Pennsylvania-Delaware Serv. Station Dealers Ass'n*, 499 F. Supp. 553, 555-558 (D. Del. 1980) (service station owners' joint refusal to serve public, intended to force federal agency to amend price control regulations, was not protected by *Noerr*); *Superior Court Trial Lawyers Ass'n*, 107 F.T.C. 510 (1986), appeal pending, No. 86-1465 (D.C. Cir.) (boycott by government-paid lawyers directed at obtaining higher government payments not *Noerr*-protected). But see *Crown Central Petroleum Corp.* v. *Waldman*, 486 F. Supp. 759 (M.D. Pa.), rev'd on other grounds, 634 F.2d 127 (3d Cir. 1980).

claims of immunity for private restraints notwithstanding the hope or expectation of governmental endorsement.[23]

Finally, petitioner argues (Br. 23, 31-35) that, unless *Noerr* applies in this case, the fear of antitrust liability will paralyze private standard-making organizations. That dire prediction is based on questionable assumptions and, in any event, is beside the point. Standard-making organizations present opportunities for collusive action to restrain competition. If there are sound policy arguments for immunizing conduct before such organizations, those arguments should be addressed to Congress.[24] Petitioner's conduct does not fit within the boundaries of the *Noerr* doctrine, and that doctrine should not be distorted on the basis on dubious policy arguments.

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[23] For example, the Second Circuit has held that the tariffs put into effect by AT&T are not protected under *Noerr* simply because they were filed with FCC. *Litton Systems, Inc.* v. *AT&T*, 700 F.2d 785, 806-809 (1983), cert. denied, 464 U.S. 1073 (1984). See also *Mid-Texas Communications Systems, Inc.* v. *AT&T*, 615 F.2d 1372, 1382-1383 (5th Cir.), cert. denied, 449 U.S. 912 (1980) (AT&T's refusal to interconnect, made prior to FCC involvement, is not covered by *Noerr*); *City of Kirkwood* v. *Union Electric Co.*, 671 F.2d 1173, 1180-1181 (8th Cir. 1982), cert. denied, 459 U.S. 1170 (1983) (*Noerr* does not cover all attempts to manipulate the government; filing of rate request not covered by *Noerr*). The Fifth Circuit has held that communications within medical review committees are not protected by *Noerr*, even though a committee's recommendations may be adopted by a state board. *Feminist Women's Health Center, Inc.* v. *Mohammad*, 586 F.2d at 545. Cf. *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 601-602 (1976) (plurality opinion) (privately-developed utility marketing program filed as a tariff with a state public service commission is not within the scope of *Noerr* immunity, where *pro forma* state approval "amounts to little more than approval of a private proposal").

[24] Similar arguments have frequently been made to Congress by a variety of industries. In some cases, Congress found those arguments persuasive and enacted legislation to alter the statutory regime. See, *e.g.*, National Cooperative Research Act of 1984, 15 U.S.C. (& Supp. IV) 4301 *et seq.*; Newspaper Preservation Act, 15 U.S.C. 1801 *et seq.*; Local Government Antitrust Act of 1984, 15 U.S.C. (& Supp. IV) 34 *et seq.* Congress rarely grants an industry an automatic, outright immunity. See Health Care Quality Improvement Act of 1986, Pub. L. No. 99-660, 100 Stat. 3784 (to be codified at 42 U.S.C. 11101-11152) (immunity from certain damage actions). Most often, Congress does not act on a request for immunity.

Virtually all private commercial conduct is subject to antitrust scrutiny. Far from paralyzing such conduct, the antitrust laws, when properly applied, facilitate commercial conduct that benefits the public by inhibiting unreasonable private restraints of trade. There is no reason to believe that subjecting private standard-making organizations to the antitrust laws will paralyze them.[25] Moreover, the record of antitrust enforcement in this area refutes petitioner's claim that standard-making organizations will be "chilled" unless they are afforded immunity. Private litigants have brought Sherman Act claims against such organizations and their participants for decades.[26] Yet the private standard-making system has blossomed from nearly 14,000 active standards in 1964 to approximately 30,000 standards today.[27]

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[25] Petitioner asserts (Br. 25-26) that although it has the alternative of direct petitioning of state and local governments, this is "at best irrelevant under *Noerr*." In fact, the availability of alternative means of asserting First Amendment rights is a consideration in evaluating the reasonableness of government restrictions on such rights. *E.g.*, *Pell* v. *Procunier*, 417 U.S. 817, 824 (1974).

[26] *E.g.*, *American Society of Mechanical Engineers* v. *Hydrolevel Corp.*, *supra*; *Structural Laminates, Inc.* v. *Douglas Fir Plywood Ass'n*, 399 F.2d 155 (9th Cir. 1968), cert. denied, 393 U.S. 1024 (1969); *United States* v. *National Malleable & Steel Castings Co.*, 1957 Trade Cas. ¶ 68, 890 (N.D. Ohio 1957), aff'd per curiam, 358 U.S. 38 (1958).

[27] *Hearings on S.J. Res. 33 Before the Consumer Subcomm. of the Senate Comm. on Commerce*, 90th Cong., 1st Sess. 14 (1967); Nat'l Bureau of Standards, *NBSIR 87-3576, The ABC's of Standards-Related Activities in the United States* 1 (May 1987).

Private standard-making organizations play an important role in the marketplace. But as this Court observed in *Hydrolevel*, such organizations may have power that can " 'result in economic prosperity or economic failure, for a number of businesses of all sizes throughout the country,' as well as entire segments of an industry." 456 U.S. at 570 (quoting H.R. Rep. 1981, 90th Cong., 2d Sess. 75 (1968)). Private standard-making also "can be rife with opportunities for anticompetitive activity" (456 U.S. at 571), in part because the proceedings of such organizations are conducted in private and are not open to public scrutiny. Compare *Town of Hallie* v. *City of Eau Claire*, 471 U.S. at 45 n.9. Application of the antitrust laws to standard-making organizations is necessary to assure the survival of competitive conditions in those industries that engage in such activities.[28] Petitioner's argument that private standard-making should be immunized from the antitrust laws should be addressed to Congress, which alone has the power to grant the exemption that petitioner seeks. *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 689 (1978).

[28] The NFPA has already amended its rules to prevent a similar subversion of its procedures. Thus, contrary to the *Sessions'* court's concerns (827 F.2d at 463-464), subjecting the conduct of members of standard-making organizations to antitrust scrutiny will not interfere with the free flow of information to state and municipal governments. Nor is it likely that the possibility of antitrust liability of members of standard-making organizations will discourage these groups from continuing their useful contributions, given the substantial commercial benefits of uniform industry standards. See, *e.g.*, Howe & Badger, *The Antitrust Challenge to Non-profit Certification Organizations*, 60 Wash. U.L.Q. 357, 377-380 (1982).

CONCLUSION

The judgment of the court of appeals that petitioner's actions are not entitled to *Noerr* immunity should be affirmed.

Respectfully submitted.

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DECEMBER 1987

☆ U.S. GOVERNMENT PRINTING OFFICE 1987—202-037/60212

Supreme Court, U.S.
FILED
DEC 31 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-157

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALLIED TUBE & CONDUIT CORPORATION,

Petitioner,

v.

INDIAN HEAD, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF TWENTY-FIVE STATES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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No. 87-157

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALLIED TUBE & CONDUIT CORPORATION,

Petitioner,

v.

INDIAN HEAD, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF TWENTY-FIVE STATES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTRODUCTION

The States of Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Hawaii, Iowa, Maine, Maryland, Michigan, Minnesota, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Washington, West Virginia and Wisconsin (hereinafter the "Amici States") submit this brief in support of Respondent Indian Head, Inc.'s position that the *Noerr-Pennington*[1] doctrine does not immunize anticompetitive activities by members

[1] *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965).

of private standard-setting organizations merely because the model codes they agree on are adopted in whole or in part by many state and local governments. The decision of the Second Circuit in *Indian Head, Inc. v. Allied Tube & Conduit Corp.*, 817 F.2d 938 (2d Cir. 1987) (*"Indian Head"*), should be affirmed.

INTEREST OF THE AMICI STATES

The Amici States have a vital interest in preventing an unwarranted expansion of the *Noerr-Pennington* doctrine for three reasons. First, the Attorneys General are the chief law officers of their states and are charged with the duty of enforcing the antitrust laws. In their capacity as *parens patriae*, they are authorized to bring federal antitrust actions on behalf of the citizens of their states.[2] The Attorneys General also represent their states and political subdivisions in federal antitrust actions for damages and injunctive relief, and are the primary public enforcers of the state antitrust laws, which are often interpreted in conformity with federal law. The States play a major role in antitrust enforcement and have a substantial interest in making sure that the antitrust laws are interpreted in accord with antitrust policy and the Supreme Court's prior decisions. Amici States have uncovered instances of antitrust violations by private standards-making associations and their members, have brought antitrust actions against such organizations,[3] and are currently

[2] 15 U.S.C. § 15c. *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439 (1945), (common law *parens patriae*.)

[3] *E.g., Arizona v. Maricopa Co. Medical Soc'y*, 457 U.S. 332 (1982); *State v. Colorado Springs Bd. of Realtors*, 692 P.2d 1055 (Colo. Dist. Ct. 1984;) *State v. Boulder Rental Property Ass'n*, 1982-83 Trade Cas. (CCH) ¶ 65,191-65,193 (Colo. Dist. Ct. 1980, 1981, 1983); *State v. Pikes Peak Towing Ass'n*, 1979-2 Trade Cas. (CCH) ¶ 62,985 (Colo. Dist. Ct. 1978, 1979); *State v. Colorado Certified Shorthand Reporters*, 1976-1 Trade Cas. (CCH) ¶ 60,685 (Colo. Dist. Ct. 1976); *State v. Professional Land Surveyors*, 1975-2 Trade Cas. (CCH) ¶ 60,633 (Colo. Dist. Ct. 1975); *State v. Iowa Optometric Ass'n*, 1983-2 Trade Cas. (CCH) ¶ 65,483 (Iowa Dist. Ct. 1983); *State v. Cedar Rapids Bd. of Realtors*, 1980-1 Trade Cas. (CCH) ¶ 63,713 (Iowa Dist. Ct. 1981); *New*

(Footnote Continued)

investigating standards-making behavior in other industries. Immunizing such activity would allow anticompetitive conspiracies within private standards-setting organizations to continue unchecked.

Second, the Attorneys General are representatives of government and have an interest in the integrity of the legislative process. Private associations are not governmental entities; they have no duty to protect the public interest, and they should not share the *Noerr-Pennington* antitrust immunity, which protects citizens' access to the political process.

Finally, the Attorneys General represent municipalities, counties, state agencies and other government entities that adopt and use standards, for example building and safety codes, that private contractors and builders are required to meet. The interest of the Attorneys General is to ensure that legitimate, reliable codes continue to be prepared for governmental entities to consider and adopt as they see fit. Continuing to apply the antitrust laws to private trade associations will not cause the demise of industry standard-setting but will ensure that the standards set are not tainted by conspiracies to restrain trade.

Approximately 420 private organizations issuing an estimated 32,000 sets of standards could be affected by the decision in this case.[4] A decision protecting the standard-setting activities of

York v. American Medical Ass'n, 1981-2 Trade Cas. (CCH) ¶ 64,195 (E.D.N.Y. 1981); *Ohio v. Joint Comm'n on Accredition of Hosps.*, No. C-2-79-1158 (S.D. Ohio 1979) (alleging that the Joint Commission restrained trade by failing to include non-physicians as part of the definition of hospital medical staff in the Commission's standards); *Arkansas Fuel Oil Co. v. State*, 154 Tex. 573, 280 S.W.2d 723 (1955) (adoption of codes of marketing refined petroleum products).

[4] National Bureau of Standards Special Pub. No. 681, *Standards Activities of Organizations in the United States* 1 (Aug. 1984). There is a marked upward trend in the number of private standards. Twenty years ago, there were "less than 14,000 nongovernment standards," in contrast to the estimated 32,000 private standards of the present. *Id.*

private associations of competitors from antitrust scrutiny would create an enormous loophole in antitrust law that would inevitably impede the States' efforts to preserve competition. A broad expansion of *Noerr-Pennington* immunity to trade associations would corrupt the standard-setting process, lessen the reliability and integrity of those standards to legislators and consumers, and ultimately end the pro-competitive benefits of legitimate model code organizations.

SUMMARY OF ARGUMENT

The antitrust laws prohibit industry and professional associations from conspiring to restrain trade when they make or enforce codes and standards. Such combinations in restraint of trade are subject to antitrust scrutiny even if they take the form of industry codes or standards that are subsequently adopted by government.

With the *Noerr-Pennington* doctrine, this Court carved out a limited exemption to antitrust scrutiny for concerted activity seeking to influence government. This exception was created in order to accommodate the First Amendment freedom of groups of individual and corporate citizens to petition government. When private industry associations act as standard-setting organizations, these important First Amendment considerations are not implicated. Therefore, the exception should not be expanded to include this activity.

Private associations like the NFPA are not arms of government. They are neither elected by, nor answerable to, the general public. Their concerns are the interests of the industries or professions they represent; governments, on the other hand, are presumed to act in the public interest and reflect a far broader community of concerns. Although the products of the deliberations of standard-setting associations may be adopted by government, such action does not transform private associations into governmental bodies.

Moreover, concerted activities to persuade private trade associations to adopt an anticompetitive code or standard are not "indirect petitioning" of the government for the purpose of

Noerr immunity. Allied's successful attempt to subvert NFPA's code-making clearly preceded consideration of the code by any government. Such antecedent conspiracies are not indirect lobbying of legislatures. Neither are such conspiracies "political speech," to which the antitrust laws would not apply, because they were not conducted in the "political arena" or designed to inform or convince the general public.

Private standard-setting associations, such as the NFPA, have served and can continue to serve important functions. Members of private associations may continue to confer and in good faith develop model codes or standards without running afoul of the antitrust laws. Extension of *Noerr-Pennington* immunity is not needed to permit private associations to promulgate legitimate codes and standards.

If, however, such groups of competitors are now held to be exempt from the antitrust laws and anticompetitive practices are permitted to subvert the code development process, the resulting codes may be less reliable and therefore less useful to governments and consumers. Ultimately, new competitors and products may be barred from the market by model codes designed to protect entrenched interests if antitrust immunity is extended to private standard-setting organizations.

ARGUMENT

I. THE *NOERR-PENNINGTON* DOCTRINE DOES NOT IMMUNIZE AGREEMENTS AMONG COMPETITORS WITHIN PRIVATE STANDARD-SETTING ORGANIZATIONS

A. *THE NOERR-PENNINGTON DOCTRINE WAS CREATED TO PROTECT THE RIGHT TO PETITION GOVERNMENT*

In a series of cases beginning with *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and including *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965), and *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1971), this Court articulated the principle that the antitrust laws do not apply to concerted solicitation of government action, although the action sought is anticompetitive, unless such action amounts to a mere sham. The Court in *Noerr* defined for the first time the relationship between the First Amendment right to petition and the Sherman Act. The railroads had conducted a deceptive publicity campaign directed against the trucking industry to encourage legislation that would hamper trucking. Justice Black, speaking for the Court, refused to "lightly impute to Congress an intent to invade [First Amendment] freedoms," 365 U.S. at 138, especially because the legislative history of the Sherman Act provided no basis for concluding that its purpose was "to regulate, not business activity, but political activity." *Id.* at 137. The Court held that an open, *public* campaign designed to influence the legislature would not violate the antitrust laws even though it had an anticompetitive effect.

In *Pennington*, the Supreme Court extended the doctrine to attempts to influence the executive branch. The Court held that *Noerr* protected the efforts of large mine owners and unions to increase the operating costs of small coal producers by persuading the Secretary of Labor to raise minimum wage levels. Justice White stated that: "[j]oint efforts to influence *public* officials do not violate the antitrust laws even though intended to eliminate competition." 381 U.S. at 670 (emphasis added).

Finally, in *California Motor Transport*, the Court applied *Noerr* to administrative and adjudicative proceedings. However, the Court held that the concerted opposition by a group of trucking companies to each and every license application made by their competitors regardless of the merits of the cases did not deserve *Noerr* immunity because it was a sham. In so holding, *California Motor Transport* made clear that *Noerr* rested squarely on First Amendment rights of petition and association. 404 U.S. at 510-12.

The *Noerr-Pennington* exemption, like other exemptions from the antitrust laws, should be construed narrowly. *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119, 126 (1982). When competitors act collusively within a private standard-setting association, they have no First Amendment right to violate the Sherman Act. *Giboney v. Superior Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949).[5] Because the conduct of private industry associations in setting standards does not implicate the important First Amendment considerations that gave rise to the *Noerr-Pennington* doctrine, the exception should not be expanded to include them.

B. *PRIVATE STANDARD-SETTING ORGANIZATIONS ARE NOT GOVERNMENTAL ENTITIES*

Amici States, as representatives of state and local governments, oppose Allied's attempt to usurp governmental authority for the purpose of sanitizing an illegal boycott. The NFPA, an association of competitors and other members, is not a "quasi-legislature." It is a *private* standard-setting organization and thus conspiracies to subvert its proper functioning may not be cloaked by the rationale of *Noerr* and the decisions that followed it.

The first issue for this Court is whether the NFPA is an arm of the government. In *Noerr*, this Court contrasted restraints of trade and monopolies created by "individuals or combinations

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[5] *See National Soc'y of Prof. Engineers v. United States*, 435 U.S. 679, 697-98 n.26 (1978) (First Amendment right of free speech and petition did not prohibit enforcement of injunction prohibiting anticompetitive provisions in an industry code).

of individuals or corporations," which are forbidden by the Sherman Act, with attempts "to persuade the legislature or the executive to take particular action with respect to law." 365 U.S. at 136. *California Motor Transport* further defined the scope of the *Noerr-Pennington* doctrine as "the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government." 404 U.S. at 510. The NFPA is neither a creature of the legislature, an arm of the executive, nor a court. The NFPA is not the government, even though many governmental entities make use of its model code.

In this context, the concept of a governmental entity is to be construed narrowly. In *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), the Court held that *Noerr* did not apply to a private entity that acted as an agent of government. In that case, the Canadian government had appointed Union Carbide's subsidiary as its agent for purchasing vanadium for Canadian industry. The Court held that subjecting Union Carbide to liability "for eliminating a competitor from the Canadian market by exercise of the discretionary power conferred . . . by the Canadian government would effectuate the purposes of the Sherman Act and would not remotely infringe on any of the constitutionally protected freedoms spoken of in *Noerr*." *Id.* at 707-08.

Similarly, in *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961), this Court applied antitrust principles directly to the conduct of private standard setters. The American Gas Association, ("AGA"), issued seals of approval for gas burners, and induced "municipalities and government agencies to pass ordinances which require . . . the seal of approval by AGA", 273 F.2d 196, 199 (7th Cir. 1960). This Court held that a complaint alleging a conspiracy within a private trade association to exclude a competitor's product from the market stated a cause of action under the the antitrust laws.[6]

[6] The point is further illustrated by *United States v. Johns-Manville*, 259 F. Supp. 440 (E.D. Pa. 1966), where the court denied summary judgment with

(Footnote Continued)

Even entities that possess delegated authority to act as governments for some purposes may not exercise the incidents of sovereignty for every purpose. For example, in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the State Bar Association exercised authority delegated to it by the legislature and therefore was a state agency for some purposes. The Virginia legislature had authorized the highest state court to regulate the practice of law, and that court adopted an ethical code, dealing in part with fees. *Id.* at 789. The State Bar, "a state agency by law argue[d] that in issuing fee schedule reports . . . it was merely implementing the fee provisions of the ethical code." *Id.* at 790. The Court reasoned that

> [t]he fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members . . . . The State Bar, by providing that deviation from County Bar minimum fees may lead to disciplinary action, has voluntarily joined in what is essentially a private anticompetitive activity, and in that posture cannot claim it is beyond the reach of the Sherman Act.

Id. at 791-92. *Accord, Feminist Women's Health Center, Inc. v. Mohammad*, 586 F.2d 530, 544-45 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979).

In the instant case, there was no grant or delegation of governmental status to the NFPA, so Allied cannot claim that the NFPA is an arm of government. Recognizing that, Allied instead asks this Court, by judicial fiat, to confer governmental status on the NFPA without regard to the fundamental differences between private and public entities.

A *private* standards organization prescribes rules for the regulation and restraint of interstate commerce without

respect to the defendants' activities before the private trade association, distinguishing between petitions for governmental action (within the *Noerr* doctrine) and concerted action to influence private standard-making bodies (outside *Noerr's* protection). *Id.* at 452-54.

governmental authority. *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457, 465 (1941). Standard-setting organizations like NFPA that comprise competitors therefore pose a special threat to competition. This Court has previously warned that private standard-setting organizations like NFPA "can be rife with opportunities for anticompetitive activity" because the "less altruistic [members] . . . have an opportunity to harm their employers' competitors through manipulation of [the organizations'] codes." *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556, 571 (1982). *See also* Hurwitz, *Abuse of Governmental Processes, the First Amendment, and the Boundaries of Noerr*, 74 Geo. L.J. 65, 91 (1985).

Private standard-setting associations cannot be deemed to be governments or even "quasi-governments" because they are not democratically elected or answerable to the public, are not subject to federal and state constitutional restraints imposed on government, and cannot be presumed to be acting in the public interest. There is no reason to exclude them from the antitrust scrutiny applicable to other private trade associations whose standards may not be adopted by government.

C. *ALLIED'S SUBVERSION OF THE NFPA PROCESS WAS NOT "INDIRECT PETITIONING" OF GOVERNMENT*

Conceding that NFPA is not an arm of the government, Allied argues that it and its co-conspirators were engaged in "indirect petitioning" of the government because many legislatures adopt, in whole or part, the codes promulgated by NFPA. As the facts demonstrate, the development of the NEC provision at issue here was a closed, largely industry-based activity that bears no resemblance to open democratic processes.

1. *NFPA'S Decision-Making Process Was Neither Open Nor Democratic*

Noerr clearly contrasts the railroads' open publicity campaign designed to secure legislation, which would adversely impact the trucking industry by changing general public opinion with regard to trucking, with:

> [C]ombinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the *participants* will jointly give up their trade freedom, or *help one another take away the trade freedom of others* through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements.

365 U.S. at 136 (emphasis added). The latter combinations, including the conspiracy in this case, are not entitled to *Noerr* immunity.

The Court in *Noerr* further emphasized that "the contest itself appears to have been conducted along lines normally accepted in our political system," *id.* at 145, that is to say, through speech in a democratic forum open to all citizens. In general, "the more open and politically oriented the governmental proceeding, the more likely that private parties will be able to shield their activities . . . from antitrust attack". Hurwitz, *supra* p. 12, at 82.

In sharp contrast, Allied's conduct in this case involved nonpublic attempts to subvert a private largely industry-based group. Such conduct is akin to a traditional group boycott in which competitors conspire to deprive a rival of access to a lucrative market. *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207 (1959). Rather than an open debate on the merits of a product, addressed to officials with responsibility to society as a whole, Allied conspired with its competitors to exclude a new product from a market.[7]

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[7] Subjecting Allied's conduct to antitrust scrutiny would be consistent with numerous cases in which the courts have analyzed agreements concerning the setting and implementation of standards under traditional antitrust principles without hint of *Noerr* immunity.

The *per se* rule against price fixing agreements and horizontal boycotts has been applied to standard setting, *Radiant Burners v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20 (1912); *United States v. American Radiator & Standard Sanitary Co.*, 433 F.2d 174 (3d Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); *National Macaroni Mfrs. Ass'n. v. FTC*, 345 F.2d 421 (7th Cir. 1965); *C-O-Two Fire*

(Footnote Continued)

The argument that Allied's conduct was consistent with the rules and regulations of NFPA is irrelevant. Acts that do not violate a trade or professional association's rules may nevertheless be improper under the antitrust laws. *E.g., Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). Indeed, the fact that Allied could conduct such blatantly anticompetitive activities within the rules of a standard-setting association indicates that these organizations merit close scrutiny.[8]

2. *Private Conduct Although Later Adopted By The Government Is Not Immune From Antitrust Scrutiny.*

The judicial treatment of private restraints of trade, which a governmental entity later adopts, differs dramatically from treatment of conduct that merely seeks to persuade the government itself to restrain trade. The *Noerr-Pennington* doctrine protects only the latter. If members of a trade association advocate legislation adopting an anticompetitive practice, they are protected. However, there is no immunity for those who engage in a private restraint of trade, even if it may later be subject to governmental review. *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 601-02 (1976). Similarly, filing tariffs with a government

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Equip. Co. v. United States, 197 F.2d 489, 493-97 (9th Cir.), *cert. denied*, 344 U.S. 892 (1952); *Bond Crown & Cork Co. v. FTC*, 176 F.2d 974, 979-81 (4th Cir. 1949); *Fort Howard Paper Co. v. FTC*, 156 F.2d 899 (7th Cir. 1946); *Milk & Ice Cream Can Inst. v. FTC*, 152 F.2d 478 (7th Cir.), *cert. denied*, 329 U.S. 795 (1946).

Other arrangements have been reviewed under the Rule of Reason, *Consolidated Farmers Mut. Ins. Co. v. Anchor Sav. Ass'n.*, 1980-2 Trade Cas. (CCH) ¶ 63,530 (10th Cir. 1980), *aff'g* 480 F. Supp. 640 (D. Kan. 1979); *E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm'n*, 467 F.2d 178 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973); *Structural Laminates, Inc. v. Douglas Fir Plywood Ass'n*, 261 F. Supp. 154 (D. Or. 1966), *aff'd*, 399 F.2d 155 (9th Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969); *Roofire Alarm Co. v. Royal Indem. Co.*, 202 F. Supp. 166 (E.D. Tenn. 1962), *aff'd mem.* 313 F.2d 635 (6th Cir.), *cert. denied*, 373 U.S. 949 (1963).

[8] Because the *Noerr* doctrine does not apply to activities within private standard-setting associations, the Court need not consider Petitioner's argument that its conduct does not fall within the "sham" exception to the *Noerr* doctrine.

agency does not confer immunity on the private conduct fixing the tariffs. *Litton v. American Telephone & Telegraph Co.*, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984).

Allied's vote-packing conduct within NFPA is clearly distinguishable from any legitimate petitioning of government. The widespread use of the NEC by governments as a technical resource does not convert actions within the NFPA into indirect lobbying of government. Allied's successful attempt to control NFPA code-making occurred in a closed non-political context, preceding any direct consideration of the code by the legislature. Such conduct does not rise to the level of governmental petitioning contemplated by the *Noerr-Pennington* doctrine.

II. THE SHERMAN ACT DOES NOT INFRINGE UPON LEGITIMATE STANDARD-SETTING ACTIVITIES

Limiting *Noerr* protection to actual petitioning of public officials advances the goals of the Sherman Act without impinging upon the First Amendment rights of private individuals or groups. Continued application of the antitrust laws to standard-setting organizations will serve to ensure the integrity of the codes that may ultimately be adopted by state and local governments.

A. *Application of the Sherman Act Will Not Chill the Promulgation of Model Codes*

Continued application of the antitrust laws to trade association standard-setting activities will not deter lawful participation by association members. Industry associations have powerful incentives to participate in developing codes, which are of vital interest to their members, and are unlikely to relinquish the practice. As the Court pointed out in *Hydrolevel*, associations derive substantial income and prestige from their codes:

> Although ASME may not operate for profit, it does derive benefits from its codes, including the fees the Society receives for its code-related publications and

> services, the prestige the codes bring to the Society, the influence they permit ASME to wield, and the aid the standards provide the profession of mechanical engineering.

456 U.S. at 576.

Unfettered debate within a trade association as to the propriety of a certain standard will not implicate the antitrust laws as long as the debate is not infected by collusion, vote-buying or any other arbitrary activity aimed at excluding a competitor from the market. *See Hydrolevel*, 456 U.S. at 577. Moreover, the antitrust laws will not prevent Allied and other companies from presenting its views to NFPA regarding their competitor's product, *id.*, or restrict Allied's right to petition state or local government directly as indeed Allied actually did, *Noerr*, 365 U.S. at 135-36.

B. *Application of the Noerr-Pennington Exemption Here Would Lead to Wholesale Circumvention of the Antitrust Laws*

Trade associations and their members have long been subject to the antitrust laws, *e.g.*, *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 106 S. Ct. 2009 (1986); *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982); *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978); *Radiant Burners v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961), and industry-produced model codes and standards have been developed consistent with the antitrust laws. In the context of *Noerr-Pennington* analysis, the Sherman Act and its policy must give way only to the exercise of the constitutional right to petition government. Extending the immunity, and thereby displacing antitrust scrutiny, would further neither the First Amendment nor the Sherman Act when, as in this case, genuine governmental petitioning is not involved. An antitrust exemption for standard-setting would stifle free competition and encourage all the ills the Sherman Act was designed to prevent. "The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower

prices, but also better goods and services." *National Society of Professional Engineers*, 435 U.S. at 695. *Accord, Indiana Federation of Dentists*, 476 U.S. at __, 106 S. Ct. at 2020. These valuable goals of the Sherman Act can be furthered without infringing on the First Amendment rights of trade association members to petition the government directly.

In addition, a holding that government adoption of trade association standards converts the standard-making process into *Noerr*-protected government petitioning would generate a myriad of line-drawing problems. How many legislatures, at what level of government, must enact the code? *Indian Head*, 817 F.2d at 944. Is adoption by one small township enough? Would the code-making process be protected where the code is adopted and not elsewhere? How will one weigh those communities which adopt only a portion of the code? These and other questions await the courts if a rule conferring antitrust immunity on standard-setting organizations whose codes are legislatively adopted is embraced.

The Ninth Circuit in *Sessions Tank Liners, Inc. v. Joor Manufacturing, Inc.*, 1987-2 Trade Cas. ¶ 67,692 (9th Cir.), *petition for cert. filed*, 56 U.S.L.W. 3356 (U.S. Oct. 27, 1987) (No. 87-687), faced with facts similar to those in this case, reached a conclusion contrary to the Second Circuit's decision, holding that efforts to influence a standard-setting association composed of public officials and private parties were immunized by *Noerr*. In so doing, the Ninth Circuit ignored this Court's prior treatment of standard-setting organizations and based its decision largely on the assumption that lobbying the association was the only way to lobby local governments. The Ninth Circuit applied the *Noerr-Pennington* immunity for three reasons. First, the court stated that "without a doubt" the company's actions before the association were "part of a plan to ultimately procure favorable legislation," in essence, direct lobbying to the government. *Id.* at 58,580. Next, the court decided that the association plays a "generally accepted role" in the governmental process, thereby making it a part of the government. *Id.* Finally, the court decided that all communications within the association context, even if their intent was to destroy competition, were protected because they were the same as political speech in the public arena. *Id.*

The Second Circuit in the instant case, facing identical issues, recognized that there is a real distinction between the government and private associations. The act of adopting codes, deciding legal cases or making administrative determinations is the essence of government and these actions have the force of law. Professional or trade associations, on the other hand, do not act in the political arena and their decisions do not carry the force of law. The former are properly immune from the Sherman Act, but the latter activities deserve no such immunity.

Reversal of the Second Circuit's decision in this case would transform trade associations into safe havens for future antitrust violators of all stripes. Private agreements in restraint of trade among horizontal competitors, wittingly or unwittingly ratified by trade association model code committees, may flourish if antitrust scrutiny is lifted. Activities condemned by a long line of Supreme Court and lower court cases may become fair game for competitors seeking to circumvent the antitrust laws. Such past abuses of the competitive system, conducted within the confines of trade and professional associations, have included price fixing, *Standard Sanitary Manufacturing Co. v. United States*, 226 U.S. 20 (1912); attempts to eliminate a competitor's product from the marketplace, *Hydrolevel* and *Radiant Burners;* other agreements to limit product lines, *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174 (3d Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); boycotts, *Indiana Federation of Dentists*; and agreements to restrain new product development and innovation, *United States v. Automobile Manufacturers Association*, 307 F. Supp. 617 (C.D. Cal. 1969). All of these cases involved private antitrust conspiracies, effectuated at least in part within the haven of a trade or professional association, which would be called into question if broad antitrust immunity were granted to private standard-setting organizations.

Without the discipline of antitrust scrutiny, trade associations will become mechanisms for sanctioning private anticompetitive conduct. The *Noerr* doctrine should not be extended to permit such a result.

CONCLUSION

The Second Circuit's decision should be affirmed.

Dated: December 31, 1987
New York, New York

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